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No. 82-_____

In the Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES B. ARMSTRONG, JR.,

Petitioner,

vs.

ELAYNE A. ARMSTRONG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is federal declaratory relief available to a federal military retiree to resolve federal issues regarding his property rights in Marine Corps retired pay, or may these issues only be raised as defenses to state court actions to enforce a judgment dividing this pay as community property?

2. Did Colonel Armstrong's case arise under the Constitution and laws of the United States so that federal jurisdiction existed under 28 U.S.C. § 1331?

3. Is *McCarty v. McCarty*, 453 U.S. 210 (1981), fully or partially retroactive?

LIST OF ALL PARTIES TO THE NINTH CIRCUIT APPEAL

All parties to the proceedings in the two lower courts are set forth in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

This case originated in the United States District Court for the Central District of California. The district court's unpublished order dismissing Colonel Armstrong's declaratory relief action is attached as Appendix D to this petition. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's order on grounds not raised by the district court or any of the parties is reported as *Armstrong v. Armstrong,* 696 F.2d 1237 (1983). A copy of this opinion is attached as Appendix A. Thereafter on April 8, 1983, the Court of Appeals denied petitioner Armstrong's petition for rehearing with suggestion of appropriateness of rehearing *en banc*. A copy of the order denying rehearing is attached as Appendix B.

JURISDICTION

The Ninth Circuit rendered its decision affirming the district court on January 18, 1983. (App. A.) Petitioner Armstrong filed a timely petition for rehearing with suggestion of appropriateness of a rehearing *en banc*. . On April 8, 1983, the petition for rehearing was denied in an order which stated in part: "A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing *en banc*." (App. B.) This petition was filed within 90 days from the denial of a rehearing on April 8, 1983.

Petitioner Charles B. Armstrong, Jr., invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case are set forth in Appendix E to this petition. The statutory provisions involved are set forth in Appendix F to this petition.

STATEMENT OF THE CASE

This case commenced in the United States District Court for the Central District of California with the filing of a complaint seeking declaratory and injunctive relief and restitution. (App. C.) The complaint invoked federal jurisdiction pursuant to 28 U.S.C. § 1331 in that the case arose under the United States Navy and Marine Corps retirement statutes (10 U.S.C., ch. 571, § § 6321 *et seq.*) and the Supremacy Clause of the United States (art. VI, cl.2).

A. Summary of Allegations of the Complaint

The complaint set forth the following allegations of fact:

On June 12, 1973, the Superior Court of the State of California for the County of Los Angeles entered an interlocutory judgment of dissolution of marriage, dissolving the marriage of petitioner Charles B. Armstrong, Jr. [hereinafter Colonel Armstrong] and the respondent here, Elayne A. Armstrong, The California state court action was entitled, *In re the Marriage of Armstrong,* LACSC No. WED 20776. A copy of this judgment was attached as Exhibit A to the federal district court complaint. (Exh. A in App. C to this Petition.)

On June 12, 1973, Colonel Armstrong was on active duty as a Colonel in the United States Marine Corps and had no property rights, vested or non-vested, in any Navy or Marine Corps retirement fund. (App. C—Complaint, ¶ 6.) Despite Colonel Armstrong's lack of any then-present property interest in any Navy or Marine Corps retirement fund, the Los Angeles County Superior Court made the following order for the division of future retirement checks in the interlocutory judgment entered on June 12, 1973:

> "Petitioner's [Colonel Armstrong's] interest in the Navy retirement fund is hereby declared community property to the extent of 90% thereof. Petitioner is hereby ordered to pay direct to Respondent [defendant ELAYNE A. ARMSTRONG] 45% of any and all net funds received on said Naval retirement, commencing immediately upon receipt thereof, and terminating upon the death of either Petitioner or Respondent." *Id.*, ¶ 17.

Colonel Armstrong retired from the United States Marine Corps on July 1, 1974, and received his first

retirement check on August 1, 1974. Commencing with the August 1, 1974 retirement check and continuing through the June 1, 1981 check, Colonel Armstrong paid his ex-wife the California court-ordered percentage of each such retirement check. (App. C—Complaint, ¶ ¶ 8-9.)

On June 26, 1981, this Court decided *McCarty v. McCarty*, 453 U.S. 210 (1981), which held that Congress never authorized nor required the community property division of military retired pay and that such pay continues to be the personal entitlement of the retiree. Since the *McCarty* decision on June 26, 1981, Colonel Armstrong has not made further payments of any portion of his Marine Corps retirement checks to his ex-wife pursuant to the June 12, 1973 interlocutory judgment of the Los Angeles County Superior Court. (App. C—Complaint, ¶ ¶ 10-11.)

The complaint then alleged that the June 12, 1973 interlocutory judgment dissolving the marriage of the Armstrongs was void insofar as it purported to divide the Marine Corps retired pay because the California court had no jurisdiction to divide property which was not then in existence. (App. C—Complaint, ¶ 12.)

The complaint further alleged that continued enforcement of the California judgment would interfere with Colonel Armstrong's now settled personal entitlement to his retirement checks from the United States Marine Corps and that the California judgment had to yield under the Supremacy Clause of the United States Constitution to the express intent of Congress that military retirement not be subject to division as community property. (App. C—Complaint, ¶ ¶ 13-14.)

The complaint specifically alleged that Colonel Armstrong had successfully resisted one attempt by his

ex-wife to enforce the California judgment by contempt proceedings. (App. C—Complaint, ¶ ¶ 18-19.) The complaint alleged that at the time of filing, no state court proceedings were pending to enforce the California judgment by contempt insofar as it divided Colonel Armstrong's retired pay as community property. (App. C—Complaint, ¶ 20.) It was alleged, however, that such proceedings were imminent in light of the information furnished by Colonel Armstrong in an accounting ordered by the California superior court and in view of his continuing refusal to remit a portion of his retirement checks to his ex-wife under the terms of the California judgment. (App. C—Complaint, ¶ 20.) In fact, no enforcement proceedings of any type have been brought against Colonel Armstrong in the California courts since his complaint was filed on February 12, 1982.

Out of understandable caution, Colonel Armstrong requested injunctive relief in addition to a declaratory judgment. The complaint alleged that Colonel Armstrong was a public school teacher and would suffer irreparable harm if he was jailed or fined by a California court for contempt while attempting to vindicate his federal right to the quiet enjoyment of his personal entitlement to his entire Marine Corps retirement check. (App. C—Complaint, ¶ 21.) Other than the injunctive relief allegations in the complaint, there was no application for a temporary restraining order nor any motion for a preliminary injunction filed with the district court. The action was terminated with the granting of a motion to dismiss. The complaint also sought restitution.

B. The Nature of the Federal Questions Presented

The complaint prayed for "1. A declaratory judgment that (a) plaintiff's Marine Corps retirement checks have been and continue to be his exclusive personal entitlement

not divisible as community property and (b) the June 12, 1973 California interlocutory judgment is void as it has purported to divide plaintiff's military retirement checks as community property under California law . . . ." (App. C—Complaint, ¶ 1 of prayer.)

At the core of federal jurisdiction in this case is the basic fact that any property rights in federal military or naval retired pay are statutorily created rights. In the absence of federal statute, there would be no military or naval retirement program at all.

Colonel Armstrong submits that, in seeking a declaration that he was personally entitled to the entirety of his retired pay and that the portion of the California judgment dividing retired pay, he raised the following federal questions:

— As a matter of federal law, did Colonel Armstrong's mere expectancy in 1973 future retired pay from the Marine Corps constitute "property" at all because if it was not property, the California court could not lawfully divide it as community property in the 1973 divorce proceedings?

— Insofar as no judgment can lawfully affect after-acquired property, were all of Colonel Armstrong's Marine Corps retirement checks after-acquired property as to which the 1973 California judgment had no *res judicata* or collateral estoppel effect?

— Was the California judgment void for want of subject matter jurisdiction because, as a matter of federal law, Colonel Armstrong's mere expectancy of Marine Corps retirement pay while on active duty in 1973 was not property susceptible of division under California statute creating California jurisdiction to divide such pay as "community property?"

— Was Colonel Armstrong personally entitled to the entirety of his Marine Corps retired pay because *McCarty v. McCarty, supra*, was fully retroactive or applicable to all retired service personnel prospectively from the date that opinion was filed?

Since the legal authority supporting each of these points is critical to complete understanding of Colonel Armstrong's case, the next section of this petition is devoted to an overview of that authority.

C. Proceedings in the District Court

Colonel Armstrong filed his complaint in the United States District Court for the Central District of California on February 12, 1982. (App. C.) Thereafter Mrs. Armstrong moved to dismiss the complaint on the grounds that (1) the district court lacked jurisdiction over the subject matter of the action because it involved domestic relations and (2) the complaint failed to state a cause of action because a prior state court decision between the parties was *res judicata*. (Ninth Circuit Excerpt, pp. 13-72.) Colonel Armstrong filed a memorandum in opposition to the motion to dismiss. (Excerpt, pp. 76-102.) Mrs. Armstrong filed a reply memorandum, and the case was ready for hearing. (Excerpt, pp. 105-129.)

On april 19, 1982, the district judge heard oral argument on Mrs. Armstrong's motion to dismiss. The argument by counsel for both parties was addressed to the limited issues raised in the moving papers, and the judge asked no questions suggesting that there were other issues that should be addressed. On April 27, 1982, the district court filed an order granting Mrs. Armstrong's motion to dismiss. This order was based on one of the grounds raised by Mrs. Armstrong (*res judicata*) and five grounds which were raised by the court on its own. This order was entered on April 28, 1982. (App. D.)

The appeal was taken from the order dismissing Colonel Armstrong's action. The notice of appeal was timely filed on May 26, 1982. (Excerpt, p. 135.)

D. The Ninth Circuit's Action

The Ninth Circuit affirmed the district court's order dismissing Colonel Armstrong's action. (App. A.) The ground for affirmance was a ground not advanced by counsel for Mrs. Armstrong or the district judge. In essence, the Ninth Circuit has held that federal declaratory relief is not available to Colonel Armstrong because he can assert his federal claims as defenses in state civil or criminal proceedings to enforce the 1973 California judgment, if and when any such proceedings may be instituted by his wife. The Ninth Circuit ignores the basic right of a plaintiff to choose his forum or to attack a state judgment directly or collaterally in federal court for jurisdictional defects based on federal law.

THE LEGAL BASIS FOR FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. § 1331

To assist the Court in understanding Colonel Armstrong's asserted basis for federal jurisdiction, it is essential that the Court comprehend the sophistication of his legal position in order to understand why he selected a federal forum with judges skilled in the application of federal law for adjudication of his federal rights.

A. In 1973, Colonel Armstrong's Retired Pay Was Not Property under Federal Law and Hence Not Divisible As Community Property by the California Court

California Civil Code section 4800(a) provided the jurisdictional basis for the purported division of Colonel Armstrong's future retired pay while he was on active duty

with the Marine Corps in 1973. Section 4800(a) provides that the court shall ". . . in its interlocutory judgment of dissolution of the marriage . . . *divide the community property and the quasi-community property of the parties* . . . equally." (Emphasis added.)

The implicit and fundamental precondition to a division of community property pursuant to section 4800(a) is that there must be property in existence before that property can become community property susceptible of division in California marital dissolution proceedings held in a state court. The threshold jurisdictional question then is whether, in 1973, Colonel Armstrong's expectancy of future Marine Corps retired pay was "property" capable of being then classified as community property and then divided. If Colonel Armstrong had no property interest in his Marine Corps retired pay in 1973, then the California court in 1973 had no "property" to divide, and hence no jurisdiction, when it entered the interlocutory judgment dissolving the Armstrongs' marriage.

In 1973 as today, one had to look to federal law to ascertain whether an expectancy of possible future military retired pay by a serviceman on active duty was "property". In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court observed:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure and support claims of entitlement to their benefit." See also *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982).

The rules that secure and support claims of entitlement to the benefit of Marine Corps retired pay are the federal

statutes which create the right to such pay—28 U.S.C. § § 6321 *et seq.* The well established legal principle under federal law has been that ". . . there is no vested or contractual right to retired pay, which is dependent upon statutory right rather than upon common law rules governing private contracts." *Goodley v. United States*, 441 F.2d 1175, 1178 (Ct.C1. 1971).

In *McCarty v. McCarty*, 453 U.S. 210, 221-222 (1981), this Court interpreted the non-disability military retirement statutes and concluded that military retired pay was not a pension in which vested rights susceptible of division may be obtained—even though the California courts had treated it as such. *McCarty* reaffirmed the vitality of the rule of *United States v. Tyler*, 105 U.S. 224, 245 (1881), that military retired pay was reduced compensation for reduced current services. *Id.* at 221-222.

The basic federal characterization of military retired pay, such as Colonel Armstrong's Marine Corps retired pay, was settled law as of the *Tyler* decision in 1881. In 1973, military retired pay was "reduced compensation for reduced services." The significance of this phraseology in this case is that Colonel Armstrong's Marine Corps retired pay was not "property" in 1973. His "reduced compensation for reduced services," which is the basic characteristic of military retired pay, did not commence until after he actually retired from active duty on July 1, 1974. Since Colonel Armstrong's reduced services did not commence until he retired, his entitlement or "property right" in the reduced compensation for those services did not commence until that point either.

Unlike private pension plans and most public sector plans, there is no fund into which the military and naval employer and employee contribute regular amounts prior to retirement. Employees acquire "vested rights" in non-military retirement plans because there is a pool or fund of

money in being prior to retirement which may be viewed as "property" and in which such vested rights attach. By way of contrast, military and naval retired pay is funded by annual appropriations of Congress just as active duty salaries are. A member of the armed services cannot acquire a "vested right" in such an annual appropriation prior to retirement—there is simply no property to which such a "vested right" might attach. Furthermore, *Costello v. United States*, 587 F.2d 424, 426 (9th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), cited with approval in *McCarty*, teaches that, even after retirement, the retiree has no "vested right" in any particular level of compensation—it is not deferred compensation since the level can be reduced prospectively.

Since military retired pay is reduced compensation for reduced current services (and not a pension at all), it is readily apparent that Colonel Armstrong had no property rights whatsoever in future retired pay while he was still on active duty in 1973. Colonel Armstrong submits that division of his retired pay—his reduced compensation for reduced services performed after the date of dissolution—was property acquired after dissolution as a matter of federal law and was therefore not property in existence in 1973 which the California court had subject matter jurisdiction to divide as community property.

B. A Judgment Is Not Entitled To Res Judicata Effect Insofar as It Attempts To Adjudicate Rights in After-Acquired Property

Proceeding from the principles set forth in the preceding subsection, one is inescapably led to the conclusion that a state judgment is not entitled to *res judicata* effect insofar as it divides military retired pay as community property prior to the time when those federally created property rights come into existence. This conclusion emanates

from the basic principle of the law of judgments that a court of general jurisdiction, such as the Los Angeles County Superior Court, cannot divide or adjudicate rights in *after-acquired property*. The classic treatise *Freeman on Judgments* expresses this well settled principle in the following terms:

> "Under no circumstances will a judgment or decree take effect upon rights not then existing." W. Freeman, 2 *Treatise on the Law of Judgments*, § 712, at 1503 (5th ed., Bancroft-Whitney, 1925) (footnotes omitted).

> "Whenever title is put in issue and adjudicated, the judgment is *res judicata* upon this issue in any subsequent action. The effect of such an adjudication must, however, be limited to the title or right as it then stood. It is obviously not conclusive as to title and rights subsequently acquired. . . ." *Id.*, § 714, at 1507. (footnotes omitted).

The formulation of the after-acquired property exception to *res judicata* thus expressed in *Freeman on Judgments* has been cited with approval by the federal courts. *See Magruder v. Safe Deposit & Trust Co.*, 159 F.2d 913, 914-915 (4th Cir. 1947). Professor Moore's treatise cites the Freeman work for the proposition that ". . . no judgment can affect subsequently arising rights and duties." 1B *Moore's Federal Practice* (2d ed.) ¶ 0.415, at 2054.

Moreover, this principle of denying *res judicata* effect to a judgment purporting to adjudicate rights in after-acquired property has been embodied in section 72 of the *Restatement of Judgments*, which states:

> "The decision of a court on a question of fact or law involving an interest in property is not conclusive in a subsequent action between the same parties

> with reference to other property acquired by one of the parties subsequently to the judgment." *Restatement of Judgments*, § 72, at 329 (1942).

California itself follows *Freeman on Judgments* and the *Restatement* rule generally in civil litigation. In *Lord v. Garland*, 27 Cal.2d 840, 849, 168 P.2d 5 (1946), the California Supreme Court has stated:

> "And the rule of *res judicata* extends only to the facts and conditions as they existed at the time the judgment was rendered, or more correctly speaking, at the time and issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment."

Thus, the 1973 California interlocutory judgment had no *res judicata* or collateral estoppel effect in this federal action for a declaration of Colonel Armstrong's rights to his federal retirement precisely because he did not acquire those rights until he retired at a date subsequent to the 1973 judgment. Precisely because the 1973 California interlocutory judgment was not entitled to *res judicata* effect as a matter of federal law, the district court was free to enter a declaration that Colonel Armstrong was presently entitled to the entirety of his Marine Corps retired pay. This result was in no way dependent on the retroactivity of the *McCarty* decision but depended instead upon federal law regarding the nature of property rights in military retired pay.

C. The 1973 California Judgment Was Void for Want of Subject Matter Jurisdiction, and Resolution of This Jurisdictional Issue Was Directly Dependent on the Proper Application of Federal Law

For the same reason that the California judgment has no *res judicata* effect as to the division of Colonel Armstrong's

retired pay because such pay is property acquired after the date of judgment, the California judgment is likewise void because the California court had no jurisdiction to adjudicate rights in this federally created property because it was not in existence at the time the interlocutory judgment was entered. California law provides that "A judgment is void on its face if the court which rendered the judgment lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant." *County of Ventura v. Tillett*, 133 Cal.App.3d 105, 110, 183 Cal.Rptr. 741 (1982) (emphasis added). *Accord: Becker v. S.P.V. Constr. Co.*, 27 Cal.3d 489, 493, 165 Cal.Rptr. 825, 612 P.2d 915 (1980); *Armstrong v. Armstrong*, 15 Cal.3d 942, 950, 126 Cal.Rptr. 805, 544 P.2d 941 (1976).

When one applies California's own definition of a void judgment to the facts alleged in Colonel Armstrong's complaint, it is readily apparent that the 1973 interlocutory judgment was void as a matter of federal law insofar as it divided the Marine Corps retired pay before Colonel Armstrong actually retired and his property interest came into being. Under California law, the California courts have no inherent power to divide marital property—that power is statutory. Cal. Civ. Code § 4800.

It should further be noted that whereas California's definition of a void judgment purports to have three categories (lack of personal jurisdiction, lack of subject matter jurisdiction, and excess of jurisdiction by granting relief which the court has no power to grant—*County of Ventura v. Tillett, supra*), lack of subject matter jurisdiction and the granting of relief which the court has no power to grant are really a single category. If a court has no power to grant particular relief, then it appears to lack subject matter jurisdiction at least to that extent.

Finally, the 1973 California interlocutory judgment recited that "Petitioner's interest in the Navy retirement fund is hereby declared to be community property to the extent of 90% thereof." (App. C—Exh. A to Complaint.) Since there never has been a "retirement fund" of accumulated contributions for payment of Marine Corps retirement benefits, there was no property interest in such a fund in 1973. Retired pay, like active duty pay for the military, is funded by annual appropriations. Since the California court wholly misunderstood federal law establishing the nature of retired pay, it divided as "community property" an interest in a fund that did not exist and never has existed.

D. The Present Operation of the McCarty Decision on the 1973 California Interlocutory Judgment Also Presented a Substantial Federal Question

Another aspect of Colonel Armstrong's prayer for a declaratory judgment that ". . . plaintiff's Marine Corps retirement checks have been and continue to be his exclusive personal entitlement not divisible as community property" (Excerpt, p. 6, lines 3-5) was a request for a declaration of his rights under the 1981 *McCarty* decision, *supra*. This prayer was supported by the allegations of the complaint. (App. C—Complaint, ¶ ¶ 13, 14, and 17.) It is submitted that Colonel Armstrong was entitled to have a federal district court in this Circuit declare his federal rights as to whether prospective application of *McCarty* would preclude further division of his retired pay *after the date of the decision* pursuant to the pre-*McCarty* judgment.

As was pointed out to the Ninth Circuit, Colonel Armstrong was urging his circuit to adopt the view expressed by Judge Ainsworth in his dissent in *Erspan v. Badgitt*, 659 F.2d 26, 28-29 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). The fact that the Ainsworth view

had been rejected in the Fifth Circuit did not foreclose jurisdiction to decide the previously unsettled question of whether the Ainsworth view would prevail in the Ninth Circuit. Although the Ninth Circuit may look to the reasoning of other circuits for guidance, the courts of the Ninth Circuit are only bound by decisions rendered in the Ninth Circuit. *Gunther v. County of Washington*, 623 F.2d 1303, 1319 (9th Cir. 1979), *aff'd*, 452 F.2d 161 (1981). Also the denial of certiorari in *Erspan* imported no expression on the merits of the case by this Court. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1 (1973).

E. Colonel Armstrong's Complaint Satisfied the Settled Tests for Federal Question Jurisdiction

In this case, the complaint dismissed by the district court invoked federal question jurisdiction under 28 U.S.C. § 1331. A case must "arise under" federal law to support jurisdiction under section 1331. *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936), states that "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936). It further states that "The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Id.* This latter test approved in *Gully* is a variant of the formulation used in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921):

> "The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the

> United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction. . . ."

Applying these tests, one must readily conclude that the lower courts erred in holding that this case did not arise under federal law. The questions of whether the 1973 California interlocutory judgment was entitled to *res judicata* effect or void for lack of subject matter jurisdiction were dependent upon how one resolved the federal question of whether Colonel Armstrong had any property interest in 1973 in a Marine Corps retirement fund or in the retired pay that would be paid as reducecd compensation for reduced services at some future date. Thus, the issue of whether Colonel Armstrong had a present interest in his Marine Corps retired pay in 1973 or whether his property interests were acquired after the date of judgment was an "essential element" of his claim for relief in this case. Insofar as the 1973 California judgment divided his Marine Corps retired pay as community property, that portion of the judgment will be denied *res judicata* effect under his construction of the Navy and Marine Corps retirement statutes and will be supported by a contrary construction. Colonel Armstrong's right to relief thus depends upon the construction or application of the laws of the United States, and for that reason, it arises "directly" under those laws pursuant to the *Gully* test.

Colonel Armstrong's claim that the Ninth Circuit should adopt Judge Ainsworth's dissenting view in preference to the Fifth Circuit majority view on the prospective operation of *McCarty* also presented a federal question. The proper application of a new supreme court decision is as much a question of federal law as a pure question of constitutional or statutory construction. Interpretation of that new decision was an essential element of Colonel

Armstrong's claim for relief. He prevailed under one construction or interpretation of the proper prospective application of *McCarty* and lost under the contrary construction or interpretation. This aspect of his claim, therefore, also satisfied the requirement of *Gully* that the claim arise "directly" under federal law.

The Supremacy Clause is also implicated because the States, including California, are bound by the proper construction or interpretation of federal law—either as to the existence of federally created property interests in 1973 or as to the operative effect of the new decision in the *McCarty* case.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

THIS CASE RAISES AN IMPORTANT QUESTION OF LAW REGARDING FEDERAL QUESTION JURISDICTION IN FEDERAL DECLARATORY RELIEF ACTIONS

A. The Federal Questions Presented in this Case Were Not Anticipated Defenses to a State Lawsuit

The Ninth Circuit grounds its decision affirming the judgment of the district court in this case on an offshoot of the "well-pleaded complaint" rule enunciated in *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908). The cases cited by the Ninth Circuit for lack of federal question jurisdiction are progeny of the Supreme Court's decision in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950). *See, e.g., Alton Box Bd. Co. v. Espirit de Corp*, 682 F.2d 1267, 1274 (9th Cir. 1982).

This case is not a case which falls within the *Skelly* rule. *Skelly* has to do with "artful pleading" to bring a case into

federal court before the declaratory relief defendant can file a state action as a plaintiff. The present case has nothing to do with the anticipatory pleading in a federal declaratory relief action of defenses to state court lawsuits not yet filed. In the instant case, the California lawsuit had already been tried through to judgment. All that remained was continued enforcement of the state court judgment.

Prior to the Ninth Circuit decison in the present case, *Skelly* has not been applied to lawsuits already tried. The crux of the *Skelly* decision was that the federal plaintiff presented a complaint positing a state cause of action and anticipating a federal defense which could be raised in a state court lawsuit not yet tried. Here Colonel Armstrong posits no defense to a state cause of action as yet untried. He asks for a declaration of his current federal rights—is he presently entitled to the entirety of his Marine Corps retired pay or not?—a question of federal law which anticipates no defense in a pending or potential state court lawsuit because the state court lawsuit has already gone to judgment.

Furthermore, he seeks a federal declaration grounded in federal law that his retired pay is after-acquired property as to which the state court judgment has no *res judicata* or collateral estoppel effect and that the state judgment is void for lack of subject matter jurisdiction. Professor Moore's treatise states:

> "Although the equitable jurisdiction of a federal court cannot be invoked for the purpose of reviewing or correcting judgments or decrees rendered in state court, it is well settled that aside from statutory inhibitions federal courts have the power to enjoin the enforcement of, or otherwise grant appropriate equitable relief from, a state judgment when warranted by equitable

> principles and the elements of equitable and federal jurisdiciton are present." 7 *Moore's Federal Practice* ¶ 60.39[1], at 652-653 (footnotes omitted).

The declaratory judgment sought by Colonel Armstrong was, in part, in the nature of an independent action in equity to secure relief from a void judgment. By entertaining such an action a court is not interfering with the process of another court and vacating the latter's judgment but is merely acting upon the holder of the judgment (here Mrs. Armstrong), who is subject to its jurisdiction; here the independent action did not seek to vacate or annul the judgment but merely sought to deny the holder the fruits thereof. *See* 7 *Moore's Federal Practice* ¶ 60.36 at 605.

Enforcement of a void judgment may be enjoined, or the judgment may be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in the subsequent proceeding. 7 *Moore's Federal Practice*, ¶ 60.25[2] at 301. There is no provision or principle of law requiring a suit for equitable relief from a judgment to be tried by the court that rendered the judgment. Hence a federal court has jurisdiction to grant such relief from a judgment of a state court. *McNeil v. McNeil*, 78 F. 834, 835 (C.C.N.D. Cal. 1897), *affirmed*, 170 F. 289 (9th Cir. 1909); *United States v. Fallbrook Public Utility Dist.*, 193 F.Supp. 342, 361 (S.D. Cal. 1961), *reversed in part on other grounds*, 347 F.2d 48, 59 (9th Cir. 1965) (expressly holds that *res judicata* does not apply to bar equitable relief from a void state court judgment).

Furthermore, even under California law, affirmance of a void judgment by an appellate court does not bar the right of an aggrieved party to thereafter attack it on the ground that it is void. *Bank of Italy v. Cadenasso*, 206

Cal. 436, 438 (1929). Nor does dismissal of an appeal from a void judgment bar a later direct or collateral attack on the judgment as being void. *Sullivan v. Gage*, 145 Cal. 749, 770-771 (1905). If an affirmance on appeal or a dismissal of an appeal does not bar a later attack on a void judgment, it logically follows that a litigant such as Colonel Armstrong is not barred from attacking a judgment as void when he did not take an appeal from the original judgment.

There is no time limit on an attack upon a judgment as being void; a void judgment cannot acquire validity because of laches on the part of the judgment debtor. *Misco Leasing Co. v. Vaughn*, 450 F.2d 257 (10th Cir. 1971); *Taft v. Donnellan Jerome, Inc.*, 407 F.2d 807, 808 (7th Cir. 1969). For example, in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), *cert. denied*, 373 U.S. 911 (1963), a judgment was vacated as void 30 years after its entry.

B. There Will Be No Further California Civil Litigation in Which Colonel Armstrong Will Have an Opportunity To Raise His Federal Claims as "Defenses"

In concluding that the Ninth Circuit progeny of *Skelly* precluded relief in this case, this Ninth Circuit incorrectly assumed that there would be some further state court civil proceeding brought by Elayne Armstrong, at which Colonel Armstrong can assert a defense in the posture of a defendant. As was pointed out in the petition for rehearing below, the Ninth Circuit overlooked the new mechanism for enforcement under the Uniformed Services Former Spouses' Protection Act, which became effective February 1, 1983. Added by this Act was new section 1408 of Title 10 of the United States Code which permits the former Mrs. Armstrong to collect her judgment simply by sending a copy of the California judgment to the Secretary of the

Navy, who must then ". . . make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order." 10 U.S.C. § 1408(d)(1). When this method of enforcement is used, Colonel Armstrong has no state enforcement proceeding at all in which to assert any federal claims as "defenses."

Even if Elayne Armstrong sought to enforce her state court judgment by California writs of execution, California law does not provide for a hearing on the issuance of a writ of execution at which Colonel Armstrong could raise a defense. Under California Code of Civil Procedure section 682, the clerk of the superior court issues the writ of execution. Issuance of the writ is a ministerial act which is done ex parte. The clerk of the court has no discretion to refuse to issue the writ, and the clerk can be compelled to perform his ministerial duty by a state writ of mandamus. *See generally* B. Witkin, 5 *California Procedure* (2d ed. 1971), § 69, p. 3443. This *ex parte* procedure will continue in effect under the new California Enforcement of Judgments Act, effective July 1, 1983. *See* Cal. Code Civ. Proc. § 699.510. The California cases hold that there is no violation of due process in the *ex parte* issuance of a writ of execution. *Phillips v. Bartolomie*, 46 Cal.App.3d 346, 349-351, 121 Cal.Rptr. 56 (1975); *Raigoza v. Sperl*, 34 Cal.App.3d 560, 564-567, 110 Cal.Rptr. 296 (1973).

Hence an analysis of California law reveals that the *Skelly* rationale is simply inapplicable to the present proceeding. *Skelly* holds simply that a party about to be made a defendant in a state court civil action cannot become a federal court plaintiff by artful pleading of a state court defense as part of a federal declaratory relief action. In this case, Colonel Armstrong is not converting himself from state court defendant status to federal court

plaintiff status. The *Phillips* and *Raigoza* cases, *supra*, are instructive on the point that, if Colonel Armstrong wants to raise the points raised in his federal action in state court, he would have to do so by action which puts him in the position of a *plaintiff*, not a defendant. In both *Phillips* and *Raigoza*, the judgment debtors had to bring their challenges to the writs of execution issued in each case *as state court plaintiffs* in actions for declaratory and injunctive relief. Even if Colonel Armstrong could raise the issue presented in the present federal action on a non-statutory motion to recall or quash a writ of execution (*see* Witkin, *supra*, 5 *California Procedure*, § § 85-86), the propriety of such a motion being doubtful, Colonel Armstrong would have to assume the posture of a plaintiff (not a defendant) because he, not Elayne Armstrong, would be the moving party.

When the Ninth Circuit states that "Armstrong's federal law issues have vitality only as defenses to enforcement of the state court judgment," it overlooks the "artful pleading" essence of *Skelly* and its progeny. Colonel Armstrong has not artfully pleaded himself into the position of a plaintiff when he should be a defendant. There is simply no state court civil proceeding in which he can assert "defenses" as opposed to affirmative claims brought as a plaintiff or moving party. The *sine qua non* of the paradigm case for lack of jurisdiction under *Skelly* is such artful pleading.

Recent scholarship questions whether the *Skelly* doctrine has any application beyond the peculiar factual context of that decision. *See* M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Michie, 1980), at 73-77. It is important to keep in mind that in this case the decision of this Court is denying Colonel Armstrong a federal forum for the adjudication of his own federal rights and relegating him to raise his

federal issues as defenses where it is doubtful that there will be any state civil proceeding in which he can raise a "defense" as opposed to an affirmative allegation as plaintiff or moving party. Law school has taught us that the plaintiff has the right to choose the federal courts, rather than the state courts, for adjudication of his important federal rights.

C. The Ninth Circuit Extend the Application of the *Skelly* Rule to Require Assertion of Federal Claims as Defenses to State Criminal Contempt Proceedings

The Ninth Circuit's decision may have the effect of relegating Colonel Armstrong to an adjudication of his federal rights as a "defense" to a state quasi-criminal proceeding rather than as a defense to a state civil action. Failure to pay a court-ordered portion of military retired pay to an ex-wife is punishable by criminal contempt in California. *In re Marriage of Fithian*, 74 Cal.App.3d 397, 141 Cal.Rptr. 506 (1977); *Verner v. Verner*, 77 Cal.App.3d 718, 143 Cal.Rptr. 826 (1978). An order finding a party in contempt is not appealable, but reviewable only on discretionary writs of certiorari or *habeas corpus*. *In re Buckley*, 10 Cal.3d 327, 110 Cal.Rptr. 121, 514 P.2d 1201 (1973). *Skelly* surely does not stand for the proposition that a district court lacks subject matter jurisdiction because there is the slim possibility that a declaratory relief plaintiff may be able to raise his federal issues as potential "defenses" in a potential future contempt action where he risks imprisonment. Furthermore, it is uncertain whether Elayne Armstrong will even bring another contempt action in light of the collection mechanism in the new Uniformed Services Former Spouses' Protection Act.

If the Ninth Circuit decision correctly interprets *Skelly*, then retired military and naval personnel will probably have less access to federal declaratory relief for ascertainment of their federal rights than the average street criminal or pornographer seeking such relief. In *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), this Court held that regardless of whether injunctive relief may be appropriate, ". . . federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute . . . ." Here there is a genuine threat of enforcement of a state judgment alleged to be invalid as a matter of federal law. There may be a distinction but there is no real difference.

D. The Federal Question Is Of Critical Importance to Hundreds of Thousands of American Military and Naval Personnel

This Court should grant certiorari in this case to establish that the courts of the United States are open to the hundreds of thousands of American military and naval personnel who seek an adjudication of the nature and extent of their federal created "property rights" in retired pay they currently are receiving or can expect to receive in the future. A career in the uniformed services requires great sacrifices, and its pursuit frequently exacts a heavy price in terms of divorce.

While the federal courts are theoretically supposed to be open for adjudication of the federal rights of citizens, decisions such as the lower courts have rendered in this case send a message to our service personnel that the federal judiciary has abandoned them to the state court systems of the community property states of this Nation. One scholar has recently written:

> "A significant function performed by the federal courts today is the adjudication and protection of federal rights and interests. Because the selection process for the appointment of federal judges generally insures a minimum degree of competence, because federal judges are exposed day after day to issues of federal law, and because federal judges may often be more sympathetic to federal interests than are state judges, it is generally conceded that the adjudication of cases arising under federal law is an important aspect of the work of the federal courts." M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power*, at 53 (Michie, 1980).

A major reason why Colonel Armstrong seeks a federal forum to protect his federal rights is that the California courts are understandably reluctant to subordinate their community property rules to overriding federal considerations which are now forced on them by the requirements of the Supremacy Clause. This point is demonstrated by the *McCarty* decision itself which reversed a longstanding California rule under its community property laws as being preempted by federal law. An interpretation of these same retirement statutes is directly involved in Colonel Armstrong's claims for declaratory and injunctive relief in this case, and he has elected to pursue those claims in a federal forum rather than a hostile state forum. Since interpretation of federal military retired pay statutes and the case law establishing their meaning is involved, the need for an expert federal tribunal to handle the issues of federal law is self-evident. Since jurisdiction under section 1331 is present, Colonel Armstrong and other service personnel like him should be permitted to pursue those claims in federal court.

The effect in human terms on the morale of the personnel in America's uniformed services of lack of access to the federal courts for adjudication of their federal-created rights in their present and future retired makes this case important from the standpoint of impact. The Ninth Circuit's misapplication of the *Skelly* rule to emasculate the remedy of declaratory relief in this case is of sufficient intrinsic importance to federal jurisprudence that the question itself should incline the Court toward a grant of certiorari.

II

A SECOND IMPORTANT QUESTION OF FEDERAL JURISDICTION ARISING UNDER THE LAWS OF THE UNITED STATES IS PRESENTED

If this Court decides to review the decision of the Ninth Circuit with respect to its misapplication of the *Skelly* decision, then Colonel Armstrong urges this Court also to consider the question of whether his complaint stated a basis for federal jurisdiction under 28 U.S.C. § 1331. Although the Ninth Circuit did not pass upon this issue, this Court has consistently held that jurisdictional issue can always be considered, even *sua sponte*, whether or not raised below. *See, e.g. Guiterrez v. Waterman Steamship Corp.*, 373 U.S. 206, 209 (1963), and cases collected in R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) at 459.

Colonel Armstrong's basis for invoking federal question jurisdiction has been set out in the section of this petition entitled "THE LEGAL BASIS FOR FEDERAL QUESTION JURISDICTION UNDER 28 U.S.C. § 1331," *supra*. The underlying issue of whether members of the United States armed forces have "property rights" in anticipated future retirement pay has importance based on the sheer numbers

of affected individuals. If, as a matter of federal law, anticipated future retirement pay was not "property" while a serviceman or woman was on active duty prior to June 26, 1981, then the courts of community property states had no jurisdiction to divide such expectancies as "community property" prior to that date. When received the retired pay would be after-acquired property as to which an antedated divorce judgment would have no *res judicata* effect. This issue has survived the enactment of the Uniformed Services Former Spouses Protection Act because that Act, while purporting to overrule *McCarty*, has not altered the fact that property rights in military and naval retired pay are still federally created rights. 10 U.S.C. § 1408.

Judicial efficiency militates in favor of considering this issue together with the first question presented in this petition. Since the issue is purely legal, preliminary consideration of the point by the Ninth Circuit is not likely to produce a more favorable record for review.

III

A THIRD IMPORTANT QUESTION IS WHETHER *McCARTY* IS RETROACTIVE OR PARTIALLY RETROACTIVE

This Court has not previously considered whether its decision in *McCarty v. McCarty* is retroactive. This question can only be addressed by this Court because of dismissal of the appeal *In re Marriage of Sheldon*, 124 Cal.App.3d 324, 177 Cal.Rptr. 380 (1981) *appeal dismissed sub nom., Sheldon v. Sheldon*, 456 U.S. 941 (1982). The California Court of Appeal in *Sheldon* expressly held that *McCarty* was not retroactive to judgments rendered in California prior to June 26, 1981. Since the retroactivity issue is foreclosed by *Sheldon* in

any court but this [*see Hicks v. Miranda*, 422 U.S. 322, 344-345 (1975)], and since the issue has been raised at all levels in this case, Colonel Armstrong urges that this issue be considered here.

The *Sheldon* decision in California erroneously based its holding of non-retroactivity on three factor test of *Chevron Oil Company v. Huson*, 404 U.S. 97, 106-107 (1981). *Sheldon, supra*, 124 Cal.App.3d at 376-377. Since *McCarty* was a statutory construction case, the proper test was that laid down by this Court in *United States v. Estate of Donnelly*, 397 U.S. 286 (1970). The applicable principle there established was that "Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward." 397 U.S. at 294. *Sheldon* overlooked the *Donnelly* rule and mistakenly used the *Huson* test applicable to retroactivity of new judge-made (non-statutory) rules.

Furthermore, Judge Ainsworth of the Fifth Circuit has made a persuasive argument for at least limited retroactivity in his dissent in *Erspan v. Badgitt, supra*, 659 F.2d at 28-29.

Resolution of the retroactivity issue still affects countless numbers of retired military and naval personnel who are involuntarily paying each month substantial percentages of their retired pay to ex-spouses, despite this Court's conclusion in *McCarty* that Congress intended such pay to be their personal entitlement and not divisible as community property.

IV

RES JUDICATA DID NOT FORECLOSE COLONEL ARMSTRONG'S FEDERAL CLAIMS

It is anticipated that *res judicata* will be urged as a basis for denying this petition. The claim of *res judicata* in this case is spurious. First of all, a void judgment is not entitled

to *res judicata* effect. 7 *Moore's Federal Practice* ¶ 60.25[2], at 300. The issue of whether the 1973 judgment was entitled *res judicata* effect was an issue that could only be raised in a proceeding subsequent to the 1973 California divorce case. A jurisdictional defect may be raised at any time. Finally, the issue of *res judicata* is essentially a factual issue. Hence it was not properly before the district court on a motion to dismiss.

CONCLUSION

For the foregoing reasons, Colonel Armstrong urges that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case and for such other relief as is just and proper.

Respectfully submitted,

JOSEPH E. DEERING, JR.
DEERING, WALTHER & SANDS
and
RUSSELL IUNGERICH
LAW OFFICES OF RUSSELL IUNGERICH

By_____
Russell Iungerich
Attorneys for Petitioner
CHARLES B. ARMSTRONG, JR.

In the Supreme Court of the United States

CHARLES B. ARMSTRONG

Petitioner,

v.

ELAYNE A. ARMSTRONG,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 1983, three (3) copies of the Petition for Writ of Certiorari were mailed postage-prepaid, to Paul J. Nestor, Esq., 2107 North Broadway, Suite 306, Santa Ana, California 95125, counsel for the respondent. I further certify that all parties required to be served have been served.

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Counsel for Petitioner
CHARLES B. ARMSTRONG, JR.

APPENDIX

APPENDIX A
NINTH CIRCUIT OPINION

FILED

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PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES B. ARMSTRONG, JR.,
Plaintiff- Appellant,
vs.
ELAYNE A. ARMSTRONG,
Defendant- Appellee.

CA NO. 82-5518

D.C. NO. CV 82-714 CHH

O P I N I O N

Appeal from the United States District Court
For the Central District of California
The Honorable Cynthia H. Hall, District Judge, Presiding
Argued and Submitted January 3, 1983

Before SKOPIL, NELSON and CANBY, Circuit Judges
PER CURIAM

The district court dismissed Armstrong's declaratory judgment action for lack of subject matter jurisdiction. We affirm.

Armstrong's marriage was dissolved by a California court in 1973. At that time, Armstrong was on active duty in the United States Marine Corps. The court awarded 45% of Armstrong's future military retired pay to his ex-wife as part of the community property settlement. In 1981, the Supreme Court held that congressional intent precluded the states from treating military retired pay as community property. *McCarty v. McCarty*, 453 U.S. 20 (1981).[1] Armstrong sought a declaratory judgment in federal district court that the 1973 judgment was no longer enforceable.

The only asserted ground of subject matter jurisdiction is 28 U.S.C. § 1331, which confers jurisdiction in cases

"arising under" federal law. Armstrong argues that his case depends upon interpretation of military retirement statutes, 10 U.S.C. ch. 571, §§ 6321, *et seq.*, and preemption of state law under the Supremacy Clause, U.S. Const., art. VI. A case does not arise under federal law, however, when the federal question is merely an anticipated defense to a state lawsuit. *Alton Box Board Co. v. Esprit de Corp.*, 682 F.2d 1267, 1273-74 (9th Cir. 1982); *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1304 (9th Cir. 1975), *aff'd*, 430 U.S. 519 (1977). Nor is a federal defense transformed into a federal cause of action by assertion of a claim for defensive declaratory relief. *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 685 F.2d 1088, 1090 (9th Cir. 1982). Armstrong's federal law issues have vitality only as defenses to enforcement of the state court judgment. Federal question jurisdiction is thus lacking here. *Chandler v. O'Bryan*, 445 F.2d 1045, 1055-56 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972).

Because of our resolution of the jurisdictional question, we need not reach the other issues presented in this case. We note, however, that the argument that *McCarty* rendered contrary state court judgments void for lack of subject matter jurisdiction was foreclosed when the United States Supreme Court dismissed the appeal of *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (1981) for want of a substantial federal question. *Sheldon v. Sheldon*, ____ U.S. ____, 102 S.Ct. 2002 (1982) (the issue on apeal is reported in 50 U.S.L.W. 3869). *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam); *Carpenter's Pension Trust v. Kronschnabel*, 632 F.2d 745, 747 (9th Cir. 1980).

The decision of the district court is accordingly AFFIRMED.

[1]In September 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (published in 51 U.S.L.W. 131). That Act permits state courts to treat retired pay for pay periods beginning after June 25, 1981, either as property of the member of the armed forces "or as property of the member and his spouse in accordance with the law of the jurisdiction." § 1408(c)(1). The effective date of the Act is February 1, 1983.

APPENDIX B
NINTH CIRCUIT ORDER DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES B. ARMSTRONG, JR.,
Appellant,

-vs-

ELAYNE A. ARMSTRONG,
Appellee.

FILED

APR 08 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

NO. CA 82-5518
DC NO. CV 82-714 CHH

O R D E R

BEFORE: SKOPIL, NELSON and CANBY, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C
VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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FILED

FEB 12 1982

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Attorneys For Plaintiff
CHARLES B. ARMSTRONG, JR.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHARLES B. ARMSTRONG, JR., Plaintiff, v. ELAYNE A. ARMSTRONG, Defendant.	82 0714 CHH Civil Action No. VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR RESTITUTION (Enforcement of Federal Right to Quiet Enjoyment of Personal Entitlement to Marine Corps Retired Pay)

Plaintiff CHARLES B. ARMSTRONG, JR. alleges:

1. This action seeks a declaratory judgment that plaintiff CHARLES B. ARMSTRONG, JR. has the exclusive right to the entirety of his retirement checks from the United States Marine Corps and that a California interlocutory judgment of dissolution of marriage is void insofar as it attempts to divide such retirement checks as

community property between plaintiff and his ex-wife. This action also seeks a temporary restraining order and preliminary and permanent injunctions against defendant ex-wife to prevent her imminent enforcement of the void California judgment by contempt, wage garnishment, or otherwise. This action further seeks restitution of all payments of portions of these retirement checks made to defendant ex-wife under the void California judgment.

2. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 in that this case arises under the Constitution and laws of the United States. This action arises under 10 U.S.C., ch. 571, § § 6321 et seq. (the United States Navy and Marine Corps retirement statutes) and under the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution. The remedy of declaratory relief has been established in 28 U.S.C. § § 2201-2202.

3. Plaintiff CHARLES B. ARMSTRONG, JR. is a retired Colonel in the United States Marine Corps.

4. Defendant ELAYNE A. ARMSTRONG is plaintiff's former wife.

5. On June 12, 1973, the Superior Court of the State of California for the County of Los Angeles entered an interlocutory judgment of dissolution of marriage, dissolving the marriage of plaintiff and defendant. The California state court action was entitled, *In re the Marriage of Armstrong*, LACSC No. WED 20776. A copy of this interlocutory judgment is attached as Exhibit A to this complaint.

6. On June 12, 1973, plaintiff CHARLES B. ARMSTRONG, JR. was on active duty as a Colonel in the United States Marine Corps and had no property rights, vested or non-vested, in any Navy or Marine Corps retirement fund.

7. Despite plaintiff's lack of any then-present property interest in any Navy or Marine Corps retirement fund, the

Los Angeles County Superior Court made the following order for the division of future retirement checks in the interlocutory judgment entered on June 12, 1973: "Petitioner's [plaintiff CHARLES B. ARMSTRONG, JR.'s] interest in the Navy retirement fund is hereby declared community property to the extent of 90% thereof. Petitioner is hereby ordered to pay direct to Respondent [defendant ELAYNE A. ARMSTRONG] 45% of any and all net funds received on said Naval retirement, commencing immediately upon receipt thereof, and terminating upon the death of either Petitioner or Respondent."

8. Plaintiff CHARLES B. ARMSTRONG, JR. retired from the United States Marine Corps on July 1, 1974, and received his first retirement check on August 1, 1974.

9. Commencing with the August 1, 1974 retirement check and continuing through the June 1, 1981 check, plaintiff CHARLES B. ARMSTRONG, JR. paid defendant ELAYNE A. ARMSTRONG the court-ordered percentage of each such retirement check.

10. On June 26, 1981, The United States Supreme Court decided *McCarty v. McCarty*, 453 U.S. _____, 69 L.Ed.2d _____, 101 S.Ct. 2728 (1981), which held that Congress never authorized nor required the community property division of military retired pay and that such pay continues to be the personal entitlement of the retiree.

11. Since the *McCarty* decision on June 26, 1981, plaintiff CHARLES B. ARMSTRONG, JR. has steadfastly refused, and intends to continue to refuse, to make further payments of any portion of his Marine Corps retirement checks to defendant ELAYNE A. ARMSTRONG as ordered by the June 12, 1973 interlocutory judgment of the Los Angeles County Superior Court.

12. The June 12, 1973 interlocutory judgment dissolving the marriage of plaintiff CHARLES B. ARMSTRONG, JR. and defendant ELAYNE A. ARMSTRONG is void because the California court had no jurisdiction to divide property which was not then in existence.

13. Continued enforcement of the California judgment will interfere with plaintiff CHARLES B. ARMSTRONG, JR.'s now settled personal entitlement to his retirement checks from the United States Marine Corps.

14. The California judgment must yield under the Supremacy Clause of the United States Constitution to the express intent of Congress that military retirement not be subject to division as community property.

15. Plaintiff CHARLES B. ARMSTRONG, JR. has paid defendant ELAYNE A. ARMSTRONG the sum of approximately $55,875.98 under the void interlocutory judgment of June 12, 1973, and is entitled to restitution in this action of that sum or such lesser sum as may not be barred by the applicable statute of limitations.

16. Even if the *McCarty* decision were to be given prospective effect only, such prospective effect should preclude plaintiff CHARLES B. ARMSTRONG, JR.'s having to pay any portion of retirement checks received after June 26, 1981, to his ex-wife and defendant ELAYNE A. ARMSTRONG.

17. Under California law, the June 12, 1973 interlocutory judgment dividing plaintiff's military retirement checks may be enforced by contempt as well as the traditional methods of execution, including wage garnishment.

18. Plaintiff CHARLES B. ARMSTRONG, JR. successfully resisted on December 21, 1981, one order to show cause re contempt to enforce the June 12, 1973.

19. While the California superior court denied the contempt sought on December 21, 1981, that court did order plaintiff CHARLES B. ARMSTRONG, JR. to make an accounting to his ex-wife of the amounts received by him in Marine Corps retirement checks since he stopped paying his ex-wife after the *McCarty* decision.

20. Although no state court proceedings are currently pending to enforce the California judgment by contempt insofar as it divides plaintiff's military retirement checks as community property, such proceedings are imminent in light of the information furnished by him in the accounting and in view of his continuing refusal to remit a portion of his retirement checks to his ex-wife under the terms of the California judgment.

21. Plaintiff CHARLES B. ARMSTRONG, JR. will suffer irreparable harm if he may be jailed or fined by a California court at the behest of his ex-wife while attempting to vindicate his federal right to the quiet enjoyment of his personal entitlement to his entire Marine Corps retirement check. Since he is a public school teacher, he will suffer irreparable harm to his reputation even if the mechanism of wage garnishment is used to collect sums under the void California judgment from his present employer.

22. Plaintiff CHARLES B. ARMSTRONG, JR. has suffered and will continue to suffer deprivation of his personal entitlement to the entirety of his military retirement unless granted the relief prayed for in this complaint.

23. Plaintiff CHARLES B. ARMSTRONG, JR. has no plain, adequate or complete remedy at law against enforcement of that portion of the California interlocutory judgment purporting to divide his military retirement checks as community property under California law.

WHEREFORE, plaintiff CHARLES B. ARMSTRONG, JR. respectfully prays that this Court grant the following relief:

1. A declaratory judgment that (a) plaintiff's Marine Corps retirement checks have been and continue to be his exclusive personal entitlement not divisible as community property and (b) the June 12, 1973 California interlocutory judgment is void insofar as it has purported to divide plaintiff's military retirement checks as community property under California law;

2. A temporary restraining order and preliminary and permanent injunctions restraining defendant ELAYNE A. ARMSTRONG, her attorneys, agents and all persons acting in concert with them who have knowledge of the injunction, from enforcing or attempting to enforce in any way that portion of the June 12, 1973 interlocutory judgment of the Los Angeles County Superior Court dissolving the marriage of plaintiff and defendant which divides plaintiff's Marine Corps retirement as community property and orders plaintiff to pay 45% of the net retirement to defendant ELAYNE A. ARMSTRONG;

3. A judgment ordering restitution to plaintiff CHARLES B. ARMSTRONG, JR. from defendant ELAYNE A. ARMSTRONG of all sums paid to defendant by plaintiff under the void California judgment entered on June 12, 1973, or such sums whose restitution is not presently barred by any applicable statute of limitations;

4. Plaintiff's costs and attorneys' fees in this action; and

5. Such other and further relief as this Court deems just and proper.

Dated: February 10, 1982

RUSSELL IUNGERICH
LAW OFFICES OF RUSSELL IUNGERICH
and
JOSEPH E. DEERING, JR.
DEERING, WALTHER & SANDS

By Russell Iungerich

Russell Iungerich
Attorneys for Plaintiff
CHARLES B. ARMSTRONG, JR.

VERIFICATION

State of California)
) ss.
County of Los Angeles)

CHARLES B. ARMSTRONG, JR., being duly sworn deposes and says:

He is the plaintiff in the above entitled matter.

He has read the foregoing complaint for declaratory and injunctive relief and for restitution and knows the contents thereof.

The same is true of his own knowledge, except as to those matters which are stated on his information and belief, and, as to those matters, he believes it to be true.

CHARLES B. ARMSTRONG, JR.

Subscribed and sworn to before me on February 10, 1982.

[Seal]

Notary Public for the State of California, County of Los Angeles

OFFICIAL SEAL
MAHIRA HAMEDANI
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires AUG 14, 1982

ENTERED
CLARENCE E. CABELL, County Clerk
MAR - 7 1974
WED 30
WE 109
BY E. K. NOZAWA, DEPUTY

FILED
MAR - 7 1974
CLARENCE E. CABELL, County Clerk
BY E. K. NOZAWA, DEPUTY

Grayson & Gross, Inc.
10880 Wilshire Blvd., Ste. 2121
Los Angeles, Calif. 90024
272-9786

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

In re the marriage of

Petitioner: CHARLES B. ARMSTRONG, JR.

and

Respondent: ELAYNE W. ARMSTRONG

CASE NUMBER
WED 20776

FINAL JUDGMENT (MARRIAGE) OF DISSOLUTION

(LEGAL SEPARATION/ NULLITY/ DISSOLUTION)

The court acquired jurisdiction of the respondent on (9/22/72) 9/8/72 .....by:

- ☐ Service of process on that date, respondent not having appeared within the time permitted by law.
- ☒ Service of process on that date and respondent having appeared.
- ☐ Respondent on that date having appeared.

The court orders that:

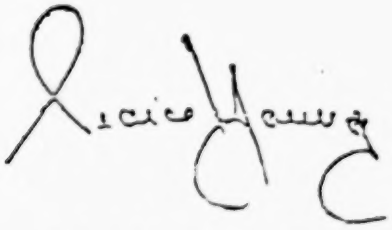
- ☐ Pursuant to ☐ Civil Code Section 4506(1) or ☐ Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below to be entered.

EXHIBIT "A"

☐ Pursuant to ☐ Civil Code Section 4400, ☐ Civil Code Section 4401, or ☐ Civil Code Section 4425( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

☒ Pursuant to ☒ Civil Code Section 4506(1) or ☐ Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory judgment, which was entered on June 12, 1973, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated



Judge of the Superior Court

ORIGINAL FILED
JUN 11, 1973
COUNTY CLERK

ENTERED Jun 12, 197
BOOK WED PAGE 237
BY J.T. RUTHER DEPUTY

GRAYSON & GROSS, INC.
10889 Wilshire Blvd., Ste. 340
Los Angeles, California 90024
272-9786
Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

In re the marriage of

Petitioner: CHARLES B. ARMSTRONG

and

Respondent: ELAYNE W. ARMSTRONG

CASE NUMBER
WED 20776

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on Jan. 3, 1973 before the Honorable Jacqueline L. Weiss, Department No. West J.

The court acquired jurisdiction of the respondent on Sept. 8, 1972 (Date) ~~Aug. 22, 1972~~ by:

☐ Service of process on that date, respondent not having appeared within the time permitted by law.

☐ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

Custody of the minor child, Andrea L. Armstrong, born March 26, 1956 is awarded to the Respondent, subject to reasonable visitation in Petitioner. Petitioner is ordered to pay direct to Respondent for support of said child, the sum of $150.00 per month, payable one-half on the 1st and 15th days of each month, commencing February 1, 1973 and continuing until further order of Court.

Petitioner is ordered to pay direct to Respondent for her support and maintenance the amount of $550.00 per month, payable one-half on the 1st and 15th days of each month, commencing February 1, 1973, and continuing until May 15, 1973, at which time spousal support shall be reduced to the sum of $500.00 per month, payable one-half on the 1st and 15th days of each month, commencing June 1, 1973 and continuing until Respondent remarries or dies, further order of Court, or until such time as Petitioner retires, which ever event shall occur first.

The following is awarded to the Respondent as her sole and separate property:

1. Marital residence, commonly known as 18002 Lassen Drive, Santa Ana, California, legally described as follows:

> Lot 40 of Tract No. 1605, as shown on a map recorded in Book 47, pages 31 and 32 of Miscellaneous Maps, records of Orange County, California

2. 1970 Ford automobile, license number 244 BZU

3. Common stock, T Rowe Price Growth Fund.

4. All monies in the First National Bank account, Orange County.

5. All monies in her name in the Navy Federal Credit Union bank account, Washington, D.C., number 051659-31

6. One-half of the books, furniture and furnishings and tools located at the marital residence.

7. All other personal property and personal effects in her possession.

The following is awarded to the Petitioner as his sole and separate property:

1. Real property in the State of Virginia, legally described as follows:

> Being part of the same land conveyed to the party of the first part by deed from Albert Small and Shirley S. Small, his wife, and others, dated November 8, 1960 and recorded November 15, 1960 in Deed Book 1951 at Page 368.

2. 1965 Mustang Automobile, license number 161 CXX.

3. All life insurance policies on his life.

4. Four Hemet Notes and Trust Deeds, W.W. Morley, O. Ruth, W.C. Morris, and C.C. Havlik, payors.

5. Security First National bank account in his name.

6. Navy Federal Credit Union bank account in his name, number 051659-07.

Petitioner's interest in the Navy retirement fund is hereby declared community property to the extent of 90% thereof. Petitioner is hereby ordered to pay direct to Respondent 45% of any and all net funds received on said Naval retirement, commencing immediately upon receipt thereof, and terminating upon the death of either Petitioner or Respondent.

Petitioner is further ordered to pay direct to Respondent to equalize the distribution of the community assets, the sum of $2,000.00 cash, payable within thirty days.

All cash in the Navy Federal Credit Union Bank account, standing in the name of Andrea L. Armstrong, shall be held in trust by Petitioner to be delivered to Andrea L. Armstrong on her 18th birthday.

DATED: June 11, 1973

JACQUELINE WEISS
Judge of the Superior Court

APPROVED:

MELVIN F. COHEN
Melvin, F. Cohen, Attorney for
Respondent

APPENDIX D
DISTRICT COURT ORDER GRANTING DEFENDANT ELAYNE ARMSTRONG'S MOTION TO DISMISS

JS-6

FILED

APR 27 1982

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED

APR 28 1982

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHARLES B. ARMSTRONG, JR., Plaintiff,	)	No. CV 82-0714-CHH
v.	)	
ELAYNE A. ARMSTRONG, Defendant.	)	ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant's motion to dismiss came before this Court for hearing on April 19, 1982. The parties appeared through counsel. The Court has considered the evidentiary matters and the points and authorities submitted in support of and in opposition to the motion and the oral argument.

IT IS HEREBY ORDERED that defendant's motion to dismiss is granted. This Order is based on the following considerations:

1. Plaintiff's claims do not arise under Federal law and the Court therefore lacks Federal question jurisdiction under 28 U.S.C. § 1331(a). Plaintiff alleges that this action arises under the United States Navy and Marine Corps retirement statute, 28 U.S.C. § 6321 *et seq.*, and the Supremacy Clause of the United States Constitution, Art. VI, § 2. The Court disagrees.

For an action to raise a Federal question, Federal law must be a direct and essential element of the plaintiff's cause of action and the Federal question must be substantial. *Smith v.* Grimm, 534 F.2d 1346, 1350 (9th Cir.), *cert. denied*, 429 U.S. 980 (1976); *see also Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1225-1227 & n.11 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979); *League to Save Lake Tahoe v. B.J.K. Corporation*, 547 F.2d 1072, 1074 (9th Cir. 1976). The Court finds that the military retirement statute is not directly in issue and that the complaint does not raise a supremacy clause issue. The Court therefore lacks subject matter jurisdiction over this action.

2. Even assuming plaintiff's claims arise under Federal law, this Court has no jurisdiction to sit in direct review of a state court judgment. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970); *see also Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481, 484-485 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

3. This Court's jurisdiction to enjoin a state court proceeding is strictly limited by the Anti-Injunction Act, 28 U.S.C. § 2283. Plaintiff has not alleged that any of the three exceptions to the limitations of that Act are present here and the Court finds that none is applicable. *See Atlantic Coast Line Railroad Company, supra*, 398 U.S. 281 (1970); *H.J. Heinz Co. v. Owens*, 189 F.2d 505 (9th Cir. 1951), *cert. denied*, 342 U.S. 675 (1952).

4. Declaratory relief is inappropriate in this case. The Declaratory Judgment Act does not confer an independent jurisdictional basis. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). But even if the Court did have jurisdiction, it would be inappropriate to exercise that

discretionary jurisdiction in this case. *See H.J. Heinz Co. v. Owens, supra*, 189 F.2d 505.

5. Plaintiff's action is barred by *res judicata*. *Erspan v. Badgett*, 659 F.2d 26 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3669 (Feb. 22, 1982). *See also Francisco Enterprises, Inc. v. Kirby, supra*, 482 F.2d at 485; *Flynn v. State Board of Chiropractic Examiners*, 418 F.2d 668 (9th Cir. 1969). Plaintiff could have appealed the 1973 state court judgment but failed to do so. In addition, plaintiff could have appealed the December 28, 1981 order.

6. Plaintiff's argument that the 1973 interlocutory judgment is void is meritless, *see In re Marriage of Brown*, 15 Cal.App.3d 838, 844 126 Cal.Rptr. 633, 636 (1976); *Bensing v. Bensing*, 25 Cal.App. 3d 889, 102 Cal.Rptr. 225 (1972), and, in any event, does not negate the fact that plaintiff could have appealed the 1973 judgment on that ground.

IT IS SO ORDERED.

Dated: April 26, 1982.

Cynthia Holcomb Hall
United States District Judge

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Supremacy Clause, art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; and deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

STATUTES INVOLVED

Federal

10 U.S.C. § 1408:

(a) In this section:

(1) "Court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which —

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which —

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(c) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not

greater that would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage);

or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if —

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently that once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired to retainer pay of a member pursuant to this section shall terminate in acordance with the terms of the applicable court order, but

not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first served basis. Such court orders shall be satisified (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned

shall—

(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4));

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(b) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out on disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a

court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

10 U.S.C. § 6149:

"Except for officers whose retired pay is computed under the Pay Readjustment Act of 1942 (56 Stat. 359), the retired pay of each retired officer of the Navy or the Marine Corps shall be computed on the basis of rates of pay provided by law, at the time of his retirement, for officers on the active list. If after the retirement of any such officer the rates of pay for officers on the active list are changed, the retired pay to which the officer is entitled shall be recomputed on the basis of the new rates."

10 U.S.C. §6322:

"(a) An officer of the Regular Navy or the Regular Marine Corps holding a permanent appointment in the

grade of warant officer, W-1, or above who applies for retirement after completing 30 or more years of active service may, in the discretion of the Secretary of the Navy, be retired.

"(b) For the purpose of this section, an officer's years of active service are computed by adding all his active service in the armed forces.

"(c) Each officer who is retired under this section is entitled to retired pay —

"(1) in the case of an officer who first became a member of a uniformed service (as defined in section 1407(a)(2) of this title) before September 8, 1980, at the rate of 75 percent of the highest basic pay of the grade in which retired; or

"(2) in the case of an officer who first became a member of a unifromed service (as defined in section 1407(a)(2) of this title) on or after September 8, 1980, at the rate of 75 percent of the monthly retired pay base computed under section 1407(d) of this title."

10 U.S.C. § 6325:

"(a) Except as provided in subsection (b) or section 1370 of this title, each officer who is retired under section 6321 or 6322 of this title —

"(1) unless otherwise entitled to a higher grade, shall be retired in the grade in which he was serving at the time of retirement; and

"(2) unless otherwise entitled to higher pay, is entitled to retired pay —

"(A) in the case of an officer who first became a member of a uniformed service (as defined in section 1407(a)(2) of this title) before September

8, 1980, at the rate of 2½ percent of the basic pay of the grade in which he retired; or

"(B) in the case of an officer who first became a member of a uniformed service (as defined in section 1407(a)(2) of this title) on or after September 8, 1980, at the rate of 2½ percent of the monthly retired pay base computed under section 1407(d) of this title;

multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay so computed may not be more than 75 percent of the basic pay or monthly retired pay base upon which the computation of retired pay is based.

"(b) Each officer who is retired while serving in the grade of admiral, vice admiral, general, or lieutenant general by virtue of an appointment under section 601 of this title or who is retired while serving in a grade to which he was appointed or promoted under section 603 of this title or promoted under section 602 or 5721 of this title —

"(1) unless otherwise entitled to a higher grade, shall be retired in the grade he would hold if he had not received such an appointment; and

"(2) unless otherwise entitled to higher pay, is entitled to retired pay —

"(A) in the case of an officer who first became a member of a uniformed service (as defined in section 1407(a)(2) of this title) before September 8, 1980, at the rate of 2½ percent of the basic pay of the grade he would hold if he had not received such an appointment; or

"(B) in the case of an officer who first became a member of a uniformed service (as defined in section 1407(a)(2) of this title) on or after

September 8, 1980, at the rate of 2½ percent of the monthly retired pay base computed under section 1407(d), of this title;

multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay so computed may not be more than 75 percent of the basic pay or monthly retired pay base upon which the computation of retired pay is based.

"(c) A warrant officer who retires under section 6321, 6322, or 6323 of this title may elect to be placed on the retired list in the highest grade and with the highest retired pay to which he is entitled under any provision of this title. If the pay of that highest grade is less then the pay of any warrant grade satisfactorily held by him on active duty, his retired pay shall be based on the higher pay."

28 U.S.C. §1331:

"(A) The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

28 U.S.C. § 2283:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

California

Civil Code § 4800(a):

"(a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally."

Code of Civil Procedure § 682
(Effective until July 1, 1983):

The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk or judge, and be directed to the sheriff, constable, or marshal, or registered process server, and it must intelligibly refer to the judgment, stating the court, the county, and in municipal and justice courts, the judicial district, where the judgment is entered, and if it be for

money, the amount therof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in Section 667, the execution must also state the kind of money or currency in which the judgment is payable, and must require the officer to whom it is directed to proceed substantially as follows:

1. If it be against the property of the judgment debtor, it must require such officer to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the abstract of judgment was filed as provided in Section 674 of this code, or at any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require such officer to satisfy the judgment, with interest, out of such property.

3. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in Section 667, it must also require such officer to satisfy the same in the kind of money or currency in which the judgment is made payable, and such officer must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. Any such officer collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal to do so, he shall be liable on his official bond to the judgment creditor in three times the amount of money so collected.

4. If it be for the delivery of the possession of real or personal property, it must require such officer to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require such officer to satisfy any cost, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Code of Civil Procedure § 699.510
(Operative July 1, 1983):

(a) Subject to subdivision (b), after entry of a money judgment, a writ of execution shall be issued by the clerk of the court upon application of the judgment creditor and shall be directed to the levying officer in the county where the levy is to be made and to any registered process server. A separate writ shall be issued for each county where a levy is to be made. Writs may be issued successively until the money judgment is satisfied, except that a new writ may not be issued for a county until the expiration of 180 days after the issuance of a prior writ for that county unless the prior writ is first returned.

(b) If the judgment creditor seeks a writ of execution to enforce a judgment made, entered, or enforceable pursuant to Family Law Act, Part 5 (commencing with Section 4000) of Division 4 of the Civil Code, in addition to the requirements of this article, the judgment creditor shall satisfy the requirements of any applicable provisions of Sections 4380 to 4384, inclusive, of the Civil Code.

Supreme Court, U.S.
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No. 82-2139

In The

Supreme Court of the United States

October Term, 1983

CHARLES B. ARMSTRONG, JR.,

Petitioner,

vs.

ELAYNE A. ARMSTRONG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court lack jurisdiction over the subject matter of the action because it is a matter of domestic relations and is not a proper subject for Federal Court Jurisdiction?

2. Did the District Court have jurisdiction to review a final unappealed State Court Judgment or was such action barred by the doctrine of res judicata?

3. Did the Anti Injunction Act, 27 U. S. C. § 2283 prohibit the District Court from granting the relief sought by Petitioner?

4. Did the District Court properly refuse to apply the Declaratory Judgment Act to Petitioner's claim?

5. Does the doctrine of res judicata prohibit prospective application of the *McCarty* Decision?

6. Is there a final judgment for the highest Court in the State from which relief can be had, pursuant to 28 U. S. C. § 1257, upon which this Court may grant a Writ of Certiorari?

7. Did the Congressional enactment of the Uniformed Services Former Spouses' Protection Act, 10 U. S. C. § 1408, render Petitioner's action moot?

LIST OF ALL PARTIES TO THE NINTH CIRCUIT APPEAL

All parties to the proceedings in the two lower courts are set forth in the caption of this case.

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No. 82-2139

In The

Supreme Court of the United States

October Term, 1983

CHARLES B. ARMSTRONG, JR.,

Petitioner,

vs.

ELAYNE A. ARMSTRONG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This case originated in the United States District Court in the Central District of California. The District Court's order granting defendant's Motion to Dismiss is attached hereto as Appendix D. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court's Order is reported as *Armstrong v. Armstrong* (1983), 696 F. 2d 1237. A copy of this opinion is attached hereto as Appendix A. On April 8, 1983,

the Court of Appeals denied petitioner Armstrong's Petition for rehearing and rejected the suggestion for a hearing en banc. A copy of said order is attached hereto as Appendix B.

JURISDICTION

As indicated in Petitioner's brief (p. 2), the Ninth Circuit affirmed the District Court's order on January 18, 1983 (App. A) and a petition for rehearing was denied (App. B). This petition was filed on June 30, 1983. However, this Court lacks jurisdiction under 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory provisions involved are set forth in Appendix E of this response.

STATEMENT OF THE CASE

On June 12, 1973, the Superior Court of the State of California for the County of Los Angeles entered an Interlocutory Judgment of Dissolution of Marriage, dissolving the 27-year marriage of the parties. The California State Court action was entitled, ***In re the Marriage of ARMSTRONG***, LACSC WED. No. 20776 (Excerpt pp. 9-11). On March 7, 1974, a Final Judgment of Dissolu-

tion of Marriage was entered in the above-referenced case. (Excerpt p. 8).

Pursuant to the terms of the Interlocutory Judgment of Dissolution of Marriage, Petitioner was ordered to pay Respondent as and for spousal support, "the amount of $550.00 per month . . . commencing February 1, 1973, and continuing until May 15, 1973, at which time spousal support shall be reduced to the sum of $500.00 per month . . . commencing June 1, 1973 and continuing until (Respondent) remarries or dies, further order of the Court, or until such time as (Petitioner) retires, whichever event shall occur first."

The Interlocutory Judgment further provided that Petitioner's "interest in the Navy retirement fund is hereby declared community property to the extent of 90% thereof. (Petitioner) is hereby ordered to pay direct to (Respondent) 45% of any and all net funds received on said Naval retirement, commencing immediately upon receipt thereof, and terminating upon the death of either (Petitioner) or (Respondent)."

Pursuant to the terms of the Interlocutory Judgment, Petitioner terminated spousal support payments at the time of his retirement from the Navy in July, 1974. In August of 1974, Petitioner commenced payment to Respondent of a portion of his Naval retirement. Between August 1, 1974 and June 1, 1981, Petitioner paid respondent sums less than the 45% ordered by the Court. From July, 1981 to present, Petitioner has refused to make any payments to Respondent pursuant to the Interlocutory Judgment of Dissolution of Marriage.

Because of Petitioner's failure to pay the amount ordered by the Court, Respondent was compelled to file a Motion for Declaratory Relief, Accounting, Appointment of Receiver and Attorney's Fees and Costs in the Superior Court of the State of California for the County of Los Angeles. (Excerpt pp. 47-56).

At the same time, Respondent filed an Order to Show Cause re Contempt wherein she alleged that Petitioner had failed to pay her the 45% of the net funds received on the Naval retirement. (Excerpt pp. 57-61).

In opposition to Respondent's Motion and Order to Show Cause, Petitioner filed a Responsive Declaration to Order to Show Cause or Notice of Motion. (Excerpt pp. 62-70). In his Responsive Declaration, Petitioner argued that the Court should dismiss both the Motion and Contempt proceedings on the grounds that the provision in the Interlocutory Judgment dividing the Military retirement as community property was void. Petitioner argued that under *McCarty v. McCarty*, 453 U. S. 210, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981), the United States Supreme Court held that Military retirement pay was not community property and, therefore, the Court could not find Petitioner in contempt and could not grant the relief requested in Respondent's Motion because the Interlocutory Judgment was a void order.

On December 21, 1981, the HONORABLE RAYMOND CHOATE, Judge of the Superior Court, heard the Motion and Order to Show Cause and rendered a decision in both matters. At the outset, the Court denied Petitioner's Motions to Dismiss the Motion and the Order to Show Cause, finding that Petitioner is bound by the Interlocutory Judgment of June 12, 1972. The Court further found

that under the *Fellers* case, 125 Cal. App. 3d 254 (1981), the *McCarty* decision cannot be applied retroactively to erase Petitioner's obligation to pay the sums owed under the Interlocutory Judgment.

With respect to the Motion for Declaratory Relief, the Court granted Respondent's motion and declared that Petitioner could not deduct the Survivor Annuity benefit from the gross retirement in determining net funds. With respect to the Motion for an Accounting, the Court ordered Petitioner to render an accounting to Respondent no later than January 21, 1982, which accounting should cover the period from August, 1974 to the present. With respect to the Motion for a Receiver, the Court denied said Motion. Finally, with respect to the Motion for Attorney's Fees and Costs, the Court awarded Respondent $1,500.00 attorney's fees to be paid by Petitioner.

Despite the Court's denial of Petitioner's Motion to Dismiss the Contempt proceeding, the Court did not find Petitioner in contempt. Specifically, the Court found that the Interlocutory Judgment of Dissolution of Marriage was a valid order and that Petitioner is obliged to pay the funds as ordered by the Court in the Interlocutory Judgment. The Court further found that Petitioner had knowledge of the Order, that Petitioner had an ability to comply with the Order and that Petitioner disobeyed the Order. However, the Court found that there was no willful disobedience of the Court's order because of the ambiguity in the law following the *McCarty* decision.

On January 14, 1982, Respondent's counsel forwarded the proposed Orders After Hearing to JUDGE CHOATE for his signature. On January 20, 1982, Petitioner's coun-

sel forwarded his rendition of the Orders After Hearing to JUDGE CHOATE. As of this date, no formal order has as yet been signed by said JUDGE and filed in this case.

On February 18, 1982, Petitioner filed a Notice of Appeal to the Court of Appeals for the 2nd Appellate District from the Superior Court order for Attorney's fees. Petitioner did not appeal any of the other orders with respect to the denial of the Motions to Dismiss, the grant of Declaratory Relief, or the grant of an accounting.

This case commenced in the United States District Court for the Central District of California when Petitioner filed a complaint seeking declaratory and injunctive relief and restitution. (App. C). The Petitioner sought declaratory judgment that Petitioner has the exclusive right to the entirety of his retirement benefits from the United States Marine Corps and that a California Interlocutory Judgment of Dissolution of Marriage is void insofar as it divided said retirement benefits as community property. The Petitioner also sought injunctions against Respondent to prevent her from enforcing the California Interlocutory Judgment of Dissolution of Marriage. Finally, the Petitioner sought restitution of all payments of the retirement benefits made to Respondent under the California Interlocutory Judgment of Dissolution of Marriage.

The complaint alleged that the June 12, 1973 Interlocutory Judgment dissolving the marriage of the parties is void because the California Court had no jurisdiction to divide the military retirement. Accordingly, Petitioner seeks to obtain a declaratory judgment that Petitioner's military retirement is his exclusive personal entitlement

and not divisible as community property and that the California Interlocutory Judgment of Dissolution of Marriage is void. In addition, Petitioner requests a temporary restraining order and preliminary and permanent injunction restraining Respondent from enforcing in any way that portion of the Interlocutory Judgment which divides Petitioner's military retirement. (Excerpt p. 6).

Respondent moved to dismiss this action pursuant to Fed. Rules Civ. Pro. Rule 12 (b) (1) and (6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

The District Court granted Respondent's motion to dismiss. The District Court supported its order by holding that Petitioner's claims lacked Federal question jurisdiction under 28 U. S. C. § 1331(a) because Federal law was not a direct, essential and substantial element of the cause of action. Additionally, the Court held that the District Court had no jurisdiction to sit in direct review of a State Court Judgment, that the Court's jurisdiction was limited by the Anti-Injunction Act, 25 U. S. C. § 2283, that the cause of action was barred by *res judicata* and that the argument that the 1973 Interlocutory Judgment was void, is meritless, citing *In re Marriage of Brown*, 15 Cal. 3d 838, 844, 126 Cal. Rptr. 633, 636 (1976) and *Bensing v. Bensing*, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972).

The District Court's dismissal was affirmed on January 18, 1983 by United States Court of Appeals for the Ninth Circuit for want of Federal question jurisdiction.

ARGUMENT

I. The District Court Lacked Jurisdiction Over The Subject Matter Of This Action Because It Is A Matter Of Domestic Relations And Is Not A Proper Subject For Federal Court Jurisdiction.

It is universally recognized that the Federal Courts are Courts of limited jurisdiction and are empowered to hear only those cases authorized to be heard by jurisdictional grant from Congress pursuant to Article III of the United States Constitution. *Morrison v. Morrison,* 408 F. Supp. 313 (N. D. Tex. 1976). One principle which stems from this characteristic of the Federal Courts is that in any given case, the Court is presumed to lack jurisdiction. This presumption must be overcome by a conclusive showing that the Court indeed is endowed with jurisdiction over the subject matter of the action. *Morrison,* supra, at 316. Thus, in the instant case the burden is on Petitioner to prove that this Court has jurisdiction over the subject matter of the action.

Repeated declarations by the Supreme Court of the United States have made unquestionably clear the proposition that Federal Courts do not have subject matter jurisdiction in domestic relations cases, *Barber v. Barber,* 21 How. 582, 16 L. Ed. 226 (1858), *Simms v. Simms,* 175 U. S. 162 (1899), *De La Roma v. De La Roma,* 201 U. S. 303.

Although the previously cited Supreme Court decisions involved cases based on diversity jurisdiction, the United States Supreme Court refused to find subject matter jurisdiction in a case based on Federal question jurisdiction. In *State of Ohio ex rel. Popovici v. Agler,* 280

U. S. 379, 383-84 (1930), the question presented was whether Ohio Courts could grant a divorce to the wife of a Roumanian vice-consul, notwithstanding statutory language giving Federal Courts "exclusive" jurisdiction of "all suits against consuls and vice-consuls." The Court denied jurisdiction.

Thus, although the prior cases referring to a domestic relations exception to Federal Court jurisdiction may have been dicta, this position was the express holding in the *Popovici* case. "It not only recognizes an exception in the area of diversity jurisdiction but completely renounces any Federal jurisdiction whatsoever in the field of domestic relations and consigns jurisdiction in that area of the law exclusively to the states." *Thrower v. Cox,* 425 F. Supp. 570 (D. D. C. 1976).

More recently, the Supreme Court has cited the *Barber* decision as bearing witness to the historical fact that "regulation of domestic relations (is) an area that has long been regarded as a virtually exclusive province of the states." *Sosna v. Iowa,* 419 U. S. 393, 404 (1975).

Following the lead of the Supreme Court, lower Federal Courts have long declined to entertain cases upon the subject of divorce, not only as to matrimonial status, but also domestic relations cases where only property rights are involved, upon the ground that the whole subject of domestic relations belongs to the laws of the states and not to the laws of the United States. ***Milligan v. Milligan,* 484 F. 2d 446 (8th Cir. 1973); *Dillard v. Family Court,* 404 F. 2d 404 (3d Cir. 1968); *Morris v. Morris,* 273 F. 2d 678 (7th Cir. 1960); *McCarty v. Hollis,* 120 F. 2d 540 (10th Cir. 1941).**

The issue presented by Petitioner would appear to have been settled on all fours recently when the U. S. Supreme Court dismissed the case of *In re Marriage of Sheldon,* 124 Cal. App. 3d 371, *for want of a substantial federal question,* 456 U. S. 941, 102 S. Ct. 2002, 72 L. Ed. 2d 462 (1982).

In the *Sheldon* case the husband had stipulated to the community property nature of his military retirement prior to the *McCarty* decision. After the time for appeal had run, husband attempted to relitigate, through the appellate process, the community nature of the military pension.

The same issue is present in this case thus, where this Court has ruled previously that there is no substantial federal question under these facts, the Respondent asserts that the Court's holding should remain consistent.

II. The California State Court Had Jurisdiction To Divide The Military Retirement And Its Decision Is Subject To The Principle Of Res Judicata.

Petitioner states that the 1973 Interlocutory Judgment is not entitled to res judicata effect with respect to after acquired property because the Court had no subject matter jurisdiction to adjudicate rights in after acquired property. In support of his position, Petitioner states that at the time of the Interlocutory Judgment, the settled California law was that a California Court could not divide Military retired pay as community property unless the military officer or enlisted man had already retired and his rights had already vested. Petitioner grossly misstates the California law at the time of the Interlocutory Judgment.

In *French v. French*, 17 Cal. 2d 775 (1941), the Court agreed with the contention that a Fleet Reserve retirement was community property. However, because the husband was not entitled to retirement pay until he completed a service of fourteen years in the Fleet Reserve, the Court held that he had no vested right in his retirement pay and, therefore, it was not subject to division as community property. Thus, in the *French* case, the retirement pay was not divided as community property because it had not vested.

Cases subsequent to *French* have limited its sweep, stating that a vested pension is community property even though it has not matured. Such was the status of the law at the time of the Armstrong Interlocutory Judgment. In *Bensing v. Bensing*, 25 Cal. App. 3d 89 (1972), the husband had completed twenty-eight years of service in the Air Force and was eligible for retirement. However, at the time of the divorce he was still in active service. The Court of Appeals rejected the husband's contention that his interest in the pension benefits constituted no more than an expectancy until his retirement. Relying on established precedent, the Court held that "Pensions become community property subject to division in a divorce, when to the extent that the party is certain to receive some payment or recovery of funds." *Bensing*, supra at 892, citing *Waite v. Waite*, 6 Cal. 3d 461 (1972); *Williamson v. Williamson*, 203 Cal. App. 2d 8 (1962).

Thus, at the time of the Armstrong Interlocutory Judgment in 1973, the California law was well established that a pension could be divided as community property if it was vested although not matured. Subsequent to the Armstrong Interlocutory Judgment, the law was changed

to reflect that pension rights, whether or not vested, represent a property interest and are subject to division in a dissolution proceeding. *In re Marriage of Brown,* 15 Cal. 3d 838 (1976).

At the time of the Interlocutory Judgment, Petitioner had completed over twenty years of service in the Navy or Marine Corps. Pursuant to 10 U. S. C. Section 6323, Petitioner had a vested, although not matured, interest in his military pension. Section 6323 provides in part:

> "(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than twenty years of active service, of which at least ten years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President."

In the instant case, as in *Bensing,* Petitioner had completed the required number of years of service and was eligible for a pension. He only needed to apply for the pension benefits to receive them. Thus, under the law in existence at the time of the Interlocutory Judgment, he had a fully vested interest in his military retirement and such retirement was subject to division as community property. Accordingly, after litigation, the State Court held that the interest in the Navy retirement fund was community property to the extent of ninety percent thereof. Thus, Petitioner's argument that the California Court had no jurisdiction to divide the Military retirement because it was after acquired property is without merit.

In his brief, Petitioner argues that the question of when Petitioner acquired property rights in the retirement is a Federal question which has been decided by the Supreme Court in the *McCarty* decision. Petitioner states

that a Military retirement is not a pension, but rather it is reduced compensation for reduced current services. Petitioner cites the *McCarty* decision as support for this proposition.

The *McCarty* decision does not support Plaintiff's contention specifically. The *McCarty* Court stated that "We need not decide today whether Federal Law prohibits a State from characterizing retired pay as deferred compensation." *McCarty*, supra, at 223. Moreover, the Court noted that "retired pay bears some of the features of deferred compensation." In footnote 16, the *McCarty* Court stated:

> "The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs but on the basis of years served on active duty and the rank obtained prior to retirement. . . . Furthermore, should the service member actually be recalled to duty, he receives additional compensation according to the active duty pay scale and his rate of retired pay is also increased thereafter." (Citations omitted.)

Moreover, Petitioner's argument that his retirement is reduced compensation for reduced current service ignores the fact that Petitioner has treated the retired pay as deferred compensation. According to the terms of the Interlocutory Judgment of Dissolution of Marriage, Petitioner was ordered to pay Respondent spousal support in the amount of $500.00 per month until such time as he retired. Pursuant to the terms of the Interlocutory Judgment, Petitioner discontinued payments of spousal support at the time of retirement and commenced payment of a percentage of his Military retirement to Respondent. If Petitioner's argument is accepted that his retired pay

is for current services, then he has a continuing obligation to pay spousal support. It is obvious that, based upon a twenty-seven year marriage, the Court intended that the payment of the Military retired pay be in lieu of spousal support.

It is clear from the foregoing that the California State Court had jurisdiction to divide the Military retirement at the time of the Interlocutory Judgment pursuant to the then existing State's law. Petitioner had a vested interest in the Military retirement at the time of the Interlocutory Judgment. All he had to do to receive his pension benefits was to apply for them. Thus, under the *Bensing* precedent, the State Court properly concluded that Petitioner had a vested interest in the Military retirement and that interest was subject to division as community property. Thus, the State Court Interlocutory Judgment did not divide after acquired property and is not void.

Furthermore, Petitioner failed to appeal the issue in 1973 and the question would appear to be final. Additionally, Petitioner has failed to appeal the most recent actions by Respondent in State Court.

If Petitioner claims that *McCarty* applies prospectively because it changes the law or points out that the State Court decision was wrong he still is bound by the doctrine of res judicata.

The U. S. Supreme Court recently ruled:

> "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action . . . nor are the res judicata consequences of a final un-

> appealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dept. Stores, Inc., v. Moitie*, 452 U. S. 394, 69 L. Ed. 103, 101 S. Ct. 2424 (1981).

In discussing the rationale for the doctrine of res judicata the Court cited its previous decision in *Baldwin v. Traveling Men's Assoc.*, 283 U. S. 522 (1931), where it was stated that "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, that matters once tried shall be considered forever settled as between the parties."

In *Erspan v. Badgett*, 659 F. 2d 26 (1981), *cert. denied*, 50 U. S. L. W. 3669 (Feb. 22, 1982), a Federal District Court found that it had no jurisdiction to apply the *McCarty* decision retroactively to a State divorce decree. In *Erspan*, wife brought an action to enforce the terms of the 1963 Texas divorce decree. The District Court entered a judgment which was affirmed on appeal. Subsequent to the affirmance, the United States Supreme Court announced its opinion in *McCarty*. On a rehearing, husband requested that the Court of Appeals reverse the State Court judgment with respect to the division of the Military retirement. The Court of Appeals declined to do so stating that it had no jurisdiction.

> Defendant advances no reason why that judgment should be denied its usual res judicata effect, and none is readily apparent: As a final judgment, it settles not only the issues actually litigated, but also any issues that could have been litigated in that proceeding. *Erspan*, supra at 28.

The *Erspan* Court based its decision on the *Federated Department Stores* case stating:

> "The res judicata consequences of a Final, unappealed judgment on the merits (are not) altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Erspan*, supra, at 28.

Finally, the Court stated that "nothing in *McCarty* suggests that the Supreme Court therein intended to invalidate, or otherwise render unenforceable, prior valid and subsisting State Court judgments. Absent some indication of such an intent, we decline to do so." *Erspan*, supra, at 28.

In light of the foregoing and in light of the authorities cited by Respondent in her Motion to Dismiss, it is clear that based upon the principle of res judicata this Court should not assert jurisdiction in the instant case. The issue of whether the *McCarty* decision should be applied retroactively to cases final on appeal has been decided by several California Courts of Appeal. Moreover, a Federal Court of Appeals has also addressed the issue. In each instance, the Court has applied the principle of res judicata and has denied the *McCarty* decision a retroactive effect. This Court, too, should dismiss this matter for lack of jurisdiction on the grounds that the issues raised in the Complaint has been litigated by the parties in the State proceeding.

The Anti Injunction Act, 28 U. S. C. § 2283, prohibits the District Court from granting the relief sought by appellant.

Petitioner seeks to enjoin Respondent from enforcing the State Court judgment in any manner. By necessity this would involve the enjoining of the State Courts from allowing Respondent to use the process of the Court and by indirect method invalidate the State Court judgment.

28 U. S. C. § 2283 states:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or protect or effectuate its judgments."

Petitioner has not alleged that any of the three exceptions to the limitations of that Act are present here and none are applicable. See *Atlantic Coast Line Railroad Company, supra,* 398 U. S. 281 (1970); *H. J. Heinz Co. v. Owens,* 189 F. 2d 505 (9th Cir. 1951), *cert. denied,* 342 U. S. 675 (1952).

Petitioner is asserting the jurisdiction of this Court under 28 U. S. C. § 1257(3). Aside from the issue of whether there is Federal subject matter jurisdiction or whether the action here arises under the Constitution or laws of the United States, the Petition for Writ of Certiorari is improper here because Petitioner has failed to seek a Final Judgment as to the issues from the highest Court of the State of California from which a decision could be had.

This Court has continually denied a Writ of Certiorari where the petitioning party has not sought determination of the issues from the highest Court of the State which would hear such issues. *Flynt v. Ohio,* 451 U. S. 619, 101 S. Ct. 1958, 68 L. Ed. 2d 489 (1981), *Banks v. California,* 395 U. S. 708, 89 S. Ct. 1901, 23 L. Ed. 2d 653, rehearing denied, 396 U. S. 869, 90 S. Ct. 30, 24 L. Ed. 2d 124 (1969). The Court has also interpreted and found exception to this general rule in *Cox Broadcasting Corp. v. Cohn,* 420 U. S. 469, 476-477, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). All of these exceptions provided by this Court deal with

instances where there are further proceedings pending in the State Court. In the case at bar there is no pending hearing on the merits, thus no exception need apply. More specifically, this Court dismissed a petition in *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) involving Georgia Supreme Court enforcement of a child custody decision of a lower Court and a Federal full faith and credit claim. This Court held that it was without jurisdiction to hear the Federal claim raised in the petition because it was not raised by the petitioner before the State Supreme Court.

The Petitioner in this case had two opportunities in which to appeal the California judgment of which he now complains. He could have appealed the Interlocutory Judgment of June 12, 1973 attacking the respondent's rights to his military retirement pay. Petitioner had also a right of appeal after the Superior Court's decision of December 21, 1981 which denied that the June 12, 1973 decision was void and ordered an accounting. Petitioner filed a Notice of Appeal to the California Court of Appeals for the 2d District on February 18, 1982 as to the attorney's fees which were awarded Respondent, yet not with respect to the order granting accounting of Petitioner's receipt of retirement pay. It is asserted that petitioner's proper avenue of appeal was through the State Courts subsequent to the December 21, 1981 Superior Court decision. Petitioner's questions would properly be before this Court after he sought review from the highest State Court which would hear the case.

III. The District Court Properly Refused To Apply The Declaratory Judgment Act To Petitioner's Claim.

Assuming, arguendo, that this Court has subject matter jurisdiction to consider the domestic relations issues

raised in this action, this Court should not exercise that jurisdiction because the issues raised in the complaint have already been adjudicated in a California State Court. It has long been recognized that although a claim is otherwise cognizable in Federal Court, such a claim is required to be dismissed for lack of jurisdiction where it has been adjudicated first in a State Court. *Smiley v. State of South Dakota,* 415 F. Supp. 870 (D. S. D. 1976).

In *McLain v. Lance,* 146 F. 2d 341, 345 (5th Cir. 1944) it was stated that:

> "Where a *State Court,* having jurisdiction in a suit between the *same parties* over the *same subject matter,* has defined and *declared* the rights of the parties, the Federal District Court . . . is without power to *redeclare, review,* or *set aside* such judgment or decree of the State Court, whether it be Interlocutory or Final, *because it is not a Court of review for either State or Federal cases.*" (Emphasis added.)

In discussing the declaratory judgment status the *McLain* Court stated that its purpose "is to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined." *McLain,* supra, at 346. Citing *McLain,* the Court in *Savini v. Nassau County,* 209 F. Supp. 946, 949 (E. D. N. Y. 1962) stated that the use of the declaratory judgment statute as a means to review decisions already made by the State Courts is improper.

> "Even though it were authorized to render a declaratory judgment, which we leave undecided, such a Court would not exercise such power to overturn a prior judgment of a State Court of concurrent and competent jurisdiction between the same parties and involving the same questions. No litigant is entitled

to two declarations of the same right." *Savini v. Nassau County*, supra.

Thus, it is well settled that Federal District Courts are without jurisdiction to hear Federal constitutional claims already litigated in State Courts when there is already a final appealable judgment by a State Court at the time the Federal suit is instituted. This rule of res judicata is based upon the proposition that "State Courts are competent to decide questions arising under the Federal Constitution, and Federal Courts most assuredly do not provide a forum in which disgruntled parties can relitigate Federal claims which have been presented to and decided by State Courts." *Brown v. Chastain*, 416 F. 2d 1012, 1014 (5th Cir. 1969).

It is not necessary that the Federal questions be raised in the State Court proceeding for the principle of res judicata to be applicable. The United States Supreme Court has held that res judicata principles preclude a Federal District Court from entertaining Federal Constitutional questions which were not, but could have been submitted to and determined in the State Courts. *Angel v. Bullington*, 330 U. S. 183 (1947).

The principle of res judicata has been repeatedly utilized by the 9th Circuit in refusing to assert jurisdiction over matters which have previously been litigated in the State Courts. In *Pacific Tel. and Tel. Co. v. T. UC. State of Cal.*, 600 F. 2d 1309 (9th Cir. 1979), the Court held that a judgment upon a question presented in State Court is res judicata of the same question presented in Federal Court. Further, in *Flynn v. State Board of Chiropractic Examiners*, 418 F. 2d 668 (9th Cir. 1969), the Court stated that a District Court may not entertain Appellate review

of a State Court judgment, nor hear collateral attack against such a judgment by considering a cause of action for injunctive relief.

In *Francisco Enterprises, Inc. v. Kirby*, 482 F. 2d 481 (9th Cir. 1973) the Court held that res judicata principles precludes parties from relitigating Federal Constitutional claims in a Federal District Court subsequent to an adverse determination on the merit of such claims by a State Court of competent jurisdiction. The Court further held that the sole recourse for the losing litigant is by appeal or writ of certiorari to the United States Supreme Court.

Although most of the above cited cases concern State Court final judgments, it is not necessary that the State Court decision be final. As the Court stated in *Philadelphia Transp. Co. v. Southeastern P. Transp. Auth.*, 282 F. Supp. 789, 790 (E. D. Pa. 1968), "Even if the State Courts had not yet rendered a final judgment in the matter, it would nevertheless be appropriate for this Court to refuse to entertain the declaratory judgment action, since the State Court litigation preceded the present litigation and the relief here sought was available therein." (Citations omitted).

The language of the declaratory relief status, 28 U. S. C. § 2201, is permissive in nature. The statute provides that in a case or controversy within its jurisdiction any Court of the United States *may* declare the rights and other legal relations of any interested party seeking such declaration. Thus, the statute confers a discretion upon the Court rather than an absolute right upon the litigant. *Public Service Comm. of Utah v. Wycoss Co.*, 344 U. S. 237 (1952).

There is a public policy which supports the Courts' use of discretion in exercising its jurisdiction in cases where prior State Court judgments have defined legal relations between the litigants. As the Court stated in *Lutsky v. Lutsky*, 310 F. Supp. 517, 510 (S. D. Fla. 1970), the "Courts will not countenance the use of declaratory action which would increase friction in our Federal-State system." (Citing 6A Moore, Federal Practice paragraph 5708 (2d ed. 1966)).

The applicability of res judicata principles in a case concerning domestic relations issues was discussed by the Court in *Lutsky v. Lutsky*, 310 F. Supp. 517 (S. D. Fla. 1970). In that case, the Plaintiff brought an action under the declaratory judgment act seeking a declaration that a State Court decree purporting to dissolve the marriage of Plaintiff and Defendant was null and void. Defendant filed a Motion to Dismiss, arguing that the Court lacked subject matter jurisdiction because the case fell within the marital dissolution exception and that the Complaint failed to state a claim upon which relief could be granted because the issue of marital status had been previously litigated in the State Court. Although the Court found that it had subject matter jurisdiction to consider the domestic relations issues, it declined to exercise that jurisdiction because the issues had been previously litigated by the parties in a State Court proceeding. In declining to assert jurisdiction, the Court stated that the object of the declaratory relief statute "is to afford a new form of relief where needed, not to furnish a new forum to relitigate issues previously decided." *Lutsky*, supra, at 520.

The applicability of the holding in the *Lutsky* case to this case is obvious. Petitioner herein seeks a declara-

tion that that portion of the California State Court dissolution of marriage decree dividing the military retirement as community property is null and void. That issue was decided by the Court at the original Interlocutory Judgment hearing and was not appealed by Petitioner. Moreover, the same issue was raised by Petitioner in his Motion to Dismiss appellee's Motion for Declaratory Relief and Order to Show Cause re Contempt. (Excerpt pp. 62-70). In denying Petitioner's Motions to Dismiss, the California State Court held that the Interlocutory Judgment of Dissolution of Marriage was not null and void. Rather than appealing that decision, Petitioner brought a complaint raising the same issue in this District Court proceeding. As the Court stated in *McLain*, supra, at 346, "The purpose of the declaratory judgment statute is to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined." Applying that rationale, the *Lutsky* Court refused to allow Plaintiff to relitigate issues previously decided in the State Court. In the instant case, Petitioner also should not be allowed to relitigate the same issues which were previously decided by the California State Court.

Similarly, in *Bossom v. Bossom*, 551 P. 2d 474 (2d Cir. 1976), the Court of Appeals held that Plaintiff's action for declaratory relief regarding the invalidity of a State divorce decree should be dismissed because the action fell within the matrimonial exception to Federal diversity jurisdiction. In declining to assert jurisdiction, the Court noted that Plaintiff was "asking a Federal Court in effect to modify a State divorce decree" and that there was no showing of "any inability on Plaintiff's part to

obtain from the (State) Courts such relief, if any, to which he may be entitled. *Bossom*, supra, at 475-76.

IV. The McCarty Decision Should Not Be Applied Prospectively To Retirement Payments Made After The Announcement Of The McCarty Decision.

In his Brief Petitioner argues that even if *McCarty* is not given full retroactive effect, then that decision should at least apply to all retirement payments received after the announcement of the *McCarty* decision. Petitioner argues that such a prospective application of the *McCarty* case will not unsettle the division of community property in the instant case because all community property was equally divided without regard to the military retirement benefits. Petitioner bases his argument on the dissent of Judge Ainsworth in the *Erspan* case.

As clearly pointed out by the majority in the *Erspan* case, applying the *McCarty* decision to all post-McCarty Military retirement payments would not result in placing all individuals on an equal footing. As the *Erspan* majority noted in footnote 2:

> "The dissent's proposed approach, which would enforce divisions of Military retirement benefits only to the extent that the benefits were payable before the effective date of *McCarty* would not place all individuals on an equal footing for yet another reason. Whereas under a divorce decree entered long before *McCarty* the military retirement benefits received by a former wife might be substantial, the benefits which a former wife would receive under a decree entered only a few months prior to *McCarty* would be insignificant, because the former wife would be entitled to share only those benefits actually payable before *McCarty*. Indeed, the length of time between the divorce

> decree and *McCarty* would become precisely the type of 'fortuitous circumstance,' that the defense finds objectionable."

(Citations omitted). *Erspan*, supra at 29.

Thus, by applying *McCarty* to all payments received after the announcement of the decision "the dissent would achieve prospective uniformity at the expense of individuals whose rights were determined in reliance upon a prior interpretation of the applicable law." *Erspan*, supra at 29.

In the instant case, Petitioner argues that prospective application of *McCarty* would not unsettle the parties' equal property division. Although the community property of the Armstrongs was divided without respect to the Military retirement, the payment of Forty-five percent of the Military retirement was considered by the Court in determining the issue of spousal support in this twenty-seven year marriage at the time of Colonel Armstrong's retirement. It is clear that if the Court had contemplated the possibility of Respondent losing her community property interest in the Military retirement, it would never have terminated spousal support in such a long term marriage. *In re Marriage of Morrison*, 20 Cal. 3d 437 (1978).

It appears from the foregoing that each of the three "prongs" of Petitioner's argument is without merit. In general, Petitioner argues that the 1973 Interlocutory Judgment entered by the California State Court is void and, therefore, it is not entitled to res judicata. As previously discussed, the State Court decision divided an existing vested interest in a Military pension. Moreover,

the State Court decision is not void because the *McCarty* decision is not entitled to retroactive effect. Finally, the State Court judgment is not void with respect to payments received after *McCarty* because of the principles of res judicata.

V. The Enactment Of The Uniformed Services Former Spouses' Protection Act, 10 U. S. C. § 1408 Renders Petitioners' Action Moot.

The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U. S. C. § 1408, is Federal legislation which became effective on February 1, 1983, permitting State Courts to divide military retirement pay consistent with applicable State law when fixing property rights between the parties to a divorce, dissolution, annulment or legal separation. The legislative purpose and intent of USFSPA is reflected in Senate Committee on Arms Services Report 97-502:

> "The primary purpose of the Bill (S 1814) is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty*, 453 U. S. 210 (1981).
>
> "The provisions of § 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date in which the U. S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what it was when the Courts were permitted to apply State divorce laws to military retired pay."

The application of the provisions of USFSPA has already been held by at least one California Appellate Court to have effectively reinstituted the rule that community property division applies to military pensions. *In re Marriage of Sarles*, 143 Cal. App. 3d 24, 191 Cal. Rptr. 514 (1983).

It is argued that as a result of USFSPA and its application in the case of *In re Marriage of Sarles*, supra, the questions presented by the petitioner in his action for declaratory and injunctive relief and restitution are moot.

CONCLUSION

The Writ of Certiorari sought by Petitioner should be denied for the reasons heretofore stated.

Respectfully submitted,

GERALD J. PHILLIPS and
PAUL J. NESTOR

By: /s/ PAUL J. NESTOR
Attorney for Respondent
Elayne A. Armstrong

APPENDIX A

NINTH CIRCUIT OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 82-5518
D. C. NO. CV 82-714 CHH

CHARLES B. ARMSTRONG, JR.,

Plaintiff-Appellant,

vs.

ELAYNE A. ARMSTRONG,

Defendant-Appellee.

OPINION

(Filed January 18, 1983)

Appeal from the United States District Court
For the Central District of California

The Honorable Cynthia H. Hill, District Judge, Presiding
Argued and Submitted January 3, 1983

Before SKOPIL, NELSON and CANBY, Circuit Judges

PER CURIAM

The district court dismissed Armstrong's declaratory judgment action for lack of subject matter jurisdiction. We affirm.

Armstrong's marriage was dissolved by a California court in 1973. At that time, Armstrong was on active duty in the United States Marine Corps. The court awarded 45% of Armstrong's future military retired pay to his ex-wife as part of the community property settlement. In

1981, the Supreme Court held that congressional intent precluded the states from treating military retired pay as community property. *McCarty v. McCarty*, 453 U. S. 20 (1981).[1] Armstrong sought a declaratory judgment in federal district court that the 1973 judgment was no longer enforceable.

The only asserted ground of subject matter jurisdiction is 28 U. S. C. § 1331, which confers jurisdiction in cases "arising under" federal law. Armstrong argues that his case depends upon interpretation of military retirement statutes, 10 U. S. C. ch. 571, §§ 6321, *et seq.*, and preemption of state law under the Supremacy Clause, U. S. Const., art. VI. A case does not arise under federal law, however, when the federal question is merely an anticipated defense to a state lawsuit. *Alton Box Board Co. v. Esprit de Corp.*, 682 F. 2d 1267, 1273-74 (9th Cir. 1982); *Rath Packing Co. v. Becker*, 530 F. 2d 1295, 1304 (9th Cir. 1975), *aff'd*, 430 U. S. 519 (1977). Nor is a federal defense transformed into a federal cause of action by assertion of a claim for defensive declaratory relief. *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 685 F. 2d 1088, 1090 (9th Cir. 1982). Armstrong's federal law issues have vitality only as defenses to enforcement of the state court judgment. Federal question jurisdiction is thus

---

[1]In September 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act, 10 U. S. C. § 1408 (published in 51 U. S. L. W. 131). That Act permits state courts to treat retired pay for pay periods beginning after June 25, 1981, either as property of the member of the armed forces "or as property of the member and his spouse in accordance with the law of the jurisdiction." § 1408(c)(1). The effective date of the Act is February 1, 1983.

lacking here. *Chandler v. O'Bryan*, 445 F. 2d 1045, 1055-56 (10th Cir. 1971), *cert. denied*, 405 U. S. 964 (1972).

Because of our resolution of the jurisdictional question, we need not reach the other issues presented in this case. We note, however, that the argument that *McCarty* rendered contrary state court judgments void for lack of subject matter jurisdiction was foreclosed when the United States Supreme Court dismissed the appeal of *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (1981) for want of a substantial federal question. *Sheldon v. Sheldon*, — U. S. —, 102 S. Ct. 2002 (1982) (the issue on appeal is reported in 50 U. S. L. W. 3869). *See Mandel v. Bradley*, 432 U. S. 173, 176 (1977) (per curiam); *Carpenter's Pension Trust v. Kronschnabel*, 632 F. 2d 745, 747 (9th Cir. 1980).

The decision of the district court is accordingly AFFIRMED.

APPENDIX B

NINTH CIRCUIT COURT DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. CA 82-5518
DC NO. CV 82-714 CHH

CHARLES B. ARMSTRONG, JR.,

Appellant,

vs.

ELAYNE A. ARMSTRONG,

Appellee.

ORDER
(Filed April 8, 1983)

BEFORE: SKOPIL, NELSON and CANBY,
Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 82-0714 CHH

CHARLES B. ARMSTRONG, JR.,

Plaintiff,

vs.

ELAYNE A. ARMSTRONG,

Defendant.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR RESTITUTION

(Enforcement of Federal Right to Quiet Enjoyment of Personal Entitlement to Marine Corps Retired Pay)

(Filed February 12, 1982)

Plaintiff CHARLES B. ARMSTRONG, JR. alleges:

1. This action seeks a declaratory judgment that plaintiff CHARLES B. ARMSTRONG, JR. has the ex-

clusive right to the entirety of his retirement checks from the United States Marine Corps and that a California interlocutory judgment of dissolution of marriage is void insofar as it attempts to divide such retirement checks as community property between plaintiff and his ex-wife. This action also seeks a temporary restraining order and preliminary and permanent injunctions against defendant ex-wife to prevent her imminent enforcement of the void California judgment by contempt, wage garnishment, or otherwise. This action further seeks restitution of all payments of portions of these retirement checks made to defendant ex-wife under the void California judgment.

2. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1331 in that this case arises under the Constitution and laws of the United States. This action arises under 10 U.S.C., ch. 571, §§ 6321 et seq. (the United States Navy and Marine Corps retirement statutes) and under the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution. The remedy of declaratory relief has been established in 28 U. S. C. §§ 2201-2202.

3. Plaintiff CHARLES B. ARMSTRONG, JR. is a retired Colonel in the United States Marine Corps.

4. Defendant ELAYNE A. ARMSTRONG is plaintiff's former wife.

5. On June 12, 1973, the Superior Court of the State of California for the County of Los Angeles entered an interlocutory judgment of dissolution of marriage, dissolving the marriage of plaintiff and defendant. The California state court action was entitled, *In re the Marriage of Armstrong*, LACSC No. WED 20776. A copy of

this interlocutory judgment is attached as Exhibit A to this complaint.

6. On June 12, 1973, plaintiff CHARLES B. ARMSTRONG, JR. was on active duty as a Colonel in the United States Marine Corps and had no property rights, vested or non-vested, in any Navy or Marine Corps retirement fund.

7. Despite plaintiff's lack of any then-present property interest in any Navy or Marine Corps retirement fund, the Los Angeles County Superior Court made the following order for the division of future retirement checks in the interlocutory judgment entered on June 12, 1973: "Petitioner's [plaintiff CHARLES B. ARMSTRONG, JR.'s] interest in the Navy retirement fund is hereby declared community property to the extent of 90% thereof. Petitioner is hereby ordered to pay direct to Respondent [defendant ELAYNE A. ARMSTRONG] 45% of any and all net funds received on said Naval retirement, commencing immediately upon receipt thereof, and terminating upon the death of either Petitioner or Respondent."

8. Plaintiff CHARLES B. ARMSTRONG, JR. retired from the United States Marine Corps on July 1, 1974, and received his first retirement check on August 1, 1974.

9. Commencing with the August 1, 1974 retirement check and continuing through the June 1, 1981 check, plaintiff CHARLES B. ARMSTRONG, JR. paid defendant ELAYNE A. ARMSTRONG the court-ordered percentage of each such retirement check.

10. On June 26, 1981, The United States Supreme Court decided *McCarty v. McCarty*, 453 U. S. —, 69 L. Ed. 2d —, 101 S. Ct. 2728 (1981), which held that Congress never authorized nor required the community property division of military retired pay and that such pay continues to be the personal entitlement of the retiree.

11. Since the *McCarty* decision on June 26, 1981, plaintiff CHARLES B. ARMSTRONG, JR. has steadfastly refused, and intends to continue to refuse, to make further payments of any portion of his Marine Corps retirement checks to defendant ELAYNE A. ARMSTRONG as ordered by the June 12, 1973 interlocutory judgment of the Los Angeles County Superior Court.

12. The June 12, 1973 interlocutory judgment dissolving the marriage of plaintiff CHARLES B. ARMSTRONG, JR. and defendant ELAYNE A. ARMSTRONG is void because the California court had no jurisdiction to divide property which was not then in existence.

13. Continued enforcement of the California judgment will interfere with plaintiff CHARLES B. ARMSTRONG JR.'s now settled personal entitlement to his retirement checks from the United States Marine Corps.

14. The California judgment must yield under the Supremacy Clause of the United States Constitution to the express intent of Congress that military retirement not be subject to division as community property.

15. Plaintiff CHARLES B. ARMSTRONG, JR. has paid defendant ELAYNE A. ARMSTRONG the sum of approximately $55,875.98 under the void interlocutory judgment of June 12, 1973, and is entitled to restitution

in this action of that sum or such lesser sum as may not be barred by the applicable statute of limitations.

16. Even if the *McCarty* decision were to be given prospective effect only, such prospective effect should preclude plaintiff CHARLES B. ARMSTRONG, JR.'s having to pay any portion of retirement checks received after June 26, 1981, to his ex-wife and defendant ELAYNE A. ARMSTRONG.

17. Under California law, the June 12, 1973 interlocutory judgment dividing plaintiff's military retirement checks may be enforced by contempt as well as the traditional methods of execution, including wage garnishment.

18. Plaintiff CHARLES B. ARMSTRONG, JR. successfully resisted on December 21, 1981, one order to show cause re contempt to enforce the June 12, 1973.

19. While the California superior court denied the contempt sought on December 21, 1981, that court did order plaintiff CHARLES B. ARMSTRONG, JR. to make an accounting to his ex-wife of the amounts received by him in Marine Corps retirement checks since he stopped paying his ex-wife after the *McCarty* decision.

20. Although no state court proceedings are currently pending to enforce the California judgment by contempt insofar as it divides plaintiff's military retirement checks as community property, such proceedings are imminent in light of the information furnished by him in the accounting and in view of his continuing refusal to remit a portion of his retirement checks to his ex-wife under the terms of the California judgment.

21. Plaintiff CHARLES B. ARMSTRONG, JR., will suffer irreparable harm if he may be jailed or fined by a

California court at the behest of his ex-wife while attempting to vindicate his federal right to the quiet enjoyment of his personal entitlement to his entire Marine Corps retirement check. Since he is a public school teacher, he will suffer irreparable harm to his reputation even if the mechanism of wage garnishment is used to collect sums under the void California judgment from his present employer.

22. Plaintiff CHARLES B. ARMSTRONG, JR., has suffered and will continue to suffer deprivation of his personal entilement to the entirety of his military retirement unless granted the relief prayed for in this complaint.

23. Plaintiff CHARLES B. ARMSTRONG, JR. has no plain, adequate or complete remedy at law against enforcement of that portion of the California interlocutory judgment purporting to divide his military retirement checks as community property under California law.

WHEREFORE, plaintiff CHARLES B. ARMSTRONG, JR. respectfully prays that this Court grant the following relief:

1. A declaratory judgment that (a) plaintiff's Marine Corps retirement checks have been and continue to be his exclusive personal entitlement not divisible as community property and (b) the June 12, 1973 California interlocutory judgment is void insofar as it has purported to divide plaintiff's military retirement checks as community property under California law;

2. A temporary restraining order and preliminary and permanent injunctions restraining defendant ELAYNE A. ARMSTRONG, her attorneys, agents and

all persons acting in concert with them who have knowledge of the injunction, from enforcing or attempting to enforce in any way that portion of the June 12, 1973 interlocutory judgment of the Los Angeles County Superior Court dissolving the marriage of plaintiff and defendant which divides plaintiff's Marine Corps retirement as community property and orders plaintiff to pay 45% of the net retirement to defendant ELAYNE A. ARMSTRONG;

3. A judgment ordering restitution to plaintiff CHARLES B. ARMSTRONG, JR. from defendant ELAYNE A. ARMSTRONG of all sums paid to defendant by plaintiff under the void California judgment entered on June 12, 1973, or such sums whose restitution is not presently barred by any applicable statute of limitations;

4. Plaintiff's costs and attorneys' fees in this action; and

5. Such other and further relief as this Court deems just and proper.

Dated: February 10, 1982

Russell Iungerich
Law Offices of Russell Iungerich
and
Joseph E. Deering, Jr.
Deering, Walther & Sands

By /s/ Russell Iungerich

Attorneys for Plaintiff CHARLES B. ARMSTRONG, JR.

VERIFICATION

State of California, County of Los Angeles, ss.

CHARLES B. ARMSTRONG, JR., being duly sworn deposes and says:

He is the plaintiff in the above entitled matter.

He has read the foregoing complaint for declaratory and injunctive relief and for restitution and knows the contents thereof.

The same is true of his own knowledge, except as to those matters which are stated on his information and belief, and, as to those matters, he believes it to be true.

/s/ Charles B. Armstrong, Jr.

Subscribed and sworn to before
me on February 10, 1982.

[Seal]

/s/ Maura Hamedani
Notary Public for the State of
California, County of Los Angeles

Grayson & Gross, Inc.
10880 Wilshire Blvd., Ste. 2121
Los Angeles, Calif. 90024
272-9786

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

CASE NUMBER WED 20776

In re the marriage of

Petitioner: CHARLES B. ARMSTRONG, JR.

and

Respondent: ELAYNE W. ARMSTRONG

FINAL JUDGMENT (MARRIAGE) OF DISSOLUTION

(LEGAL SEPARATION/NULLITY/DISSOLUTION)

(Filed March 7, 1974)

The court acquired jurisdiction of the respondent on 9/8/72 (9/22/72) by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

(X) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that:

( ) Pursuant to ( ) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below to be entered.

EXHIBIT "A"

( ) Pursuant to ( ) Civil Code Section 4400, ( ) Civil Code Section 4401, or ( ) Civil Code Section 4425 ( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

(X) Pursuant to (X) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Final Judgment of Dissolution be entered, and that all of

the provisions of the interlocutory judgment, which was entered on June 12, 1973, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated

By /s/ Judge of the Superior Court

Grayson & Gross, Inc.
10889 Wilshire Blvd., Ste. 340
Los Angeles, California 90024
272-9786

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

CASE NUMBER WED 20776

In re the marriage of

Petitioner: CHARLES B. ARMSTRONG

and

Respondent: ELAYNE W. ARMSTRONG

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

(Filed June 11, 1973)

This proceeding was heard on Jan. 3, 1973 before the Honorable Jacqueline L. Weiss, Department No. West J.

The court acquired jurisdiction of the respondent on Sept. 8, 1972 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

( ) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

Custody of the minor child, Andrea L. Armstrong, born March 26, 1956 is awarded to the Respondent, subject to reasonable visitation in Petitioner. Petitioner is ordered to pay direct to Respondent for support of said child, the sum of $150.00 per month, payable one-half on the 1st and 15th days of each month, commencing February 1, 1973 and continuing until further order of Court.

Petitioner is ordered to pay direct to Respondent for her support and maintenance the amount of $550.00 per

month, payable one-half on the 1st and 15th days of each month, commencing February 1, 1973, and continuing until May 15, 1973, at which time spousal support shall be reduced to the sum of $500.00 per month, payable one-half on the 1st and 15th days of each month, commencing June 1, 1973 and continuing until Respondent remarries or dies, further order of Court, or until such time as Petitioner retires, whichever event shall occur first.

The following is awarded to the Respondent as her sole and separate property:

1. Marital residence, commonly known as 18002 Lassen Drive, Santa Ana, California, legally described as follows:

Lot 40 of Tract No. 1605, as shown on a map recorded in Book 47, pages 31 and 32 of Miscellaneous Maps, records of Orange County, California.

2. 1970 Ford automobile, license number 244 BZU.

3. Common stock, T Rowe Price Growth Fund.

4. All monies in the First National Bank account, Orange County.

5. All monies in her name in the Navy Federal Credit Union bank account, Washington, D. C., number 051659-31.

6. One-half of the books, furniture and furnishings and tools located at the marital residence.

7. All other personal property and personal effects in her possession.

The following is awarded to the Petitioner as his sole and separate property:

1. Real property in the State of Virginia, legally described as follows:

Being part of the same land conveyed to the party of the first part by deed from Albert Small and Shirley S. Small, his wife, and others, dated November 8, 1960 and recorded November 15, 1960 in Deed Book 1951 at Page 368.

2. 1965 Mustang Automobile, license number 161 CXX.

3. All life insurance policies on his life.

4. Four Hemet Notes and Trust Deeds, W. W. Morley, O. Ruth, W. C. Morris, and C. C. Havlik, payors.

5. Security First National bank account in his name.

6. Navy Federal Credit Union bank account in his name, number 051659-07.

Petitioner's interest in the Navy retirement fund is hereby declared community property to the extent of 90% thereof. Petitioner is hereby ordered to pay direct to Respondent 45% of any and all net funds received on said Naval retirement, commencing immediately upon receipt thereof, and terminating upon the death of either Petitioner or Respondent.

Petitioner is further ordered to pay direct to Respondent to equalize the distribution of the community assets, the sum of $2,000.00 cash, payable within thirty days.

All cash in the Navy Federal Credit Union Bank account, standing in the name of Andrea L. Armstrong, shall be held in trust by Petitioner to be delivered to Andrea L.

Armstrong on her 18th birthday.

DATED: June 11, 1973

/s/ Jacqueline Weiss
Judge of the Superior Court

APPROVED:

/s/ Melvin F. Cohen,
Attorney for Respondent

APPENDIX D

DISTRICT COURT ORDER GRANTING DEFENDANT ELAYNE ARMSTRONG'S MOTION TO DISMISS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 82-0714-CHH

CHARLES B. ARMSTRONG, JR.,

Plaintiff,

vs.

ELAYNE A. ARMSTRONG,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

(Filed April 27, 1982)

Defendant's motion to dismiss came before this Court for hearing on April 19, 1982. The parties appeared through counsel. The Court has considered the evidentiary matters and the points and authorities submitted in support of and in opposition to the motion and the oral argument.

IT IS HEREBY ORDERED that defendant's motion to dismiss is granted. This Order is based on the following considerations:

1. Plaintiff's claims do not arise under Federal law and the Court therefore lacks Federal question jurisdiction under 28 U. S. C. § 1331(a). Plaintiff alleges that this action arises under the United States Navy and Marine

Corps retirement statute, 28 U. S. C. § 6321 *et seq.*, and the Supremacy Clause of the United States Constitution, Art. VI, § 2. The Court disagrees.

For an action to raise a Federal question, Federal law must be a direct and essential element of the plaintiff's cause of action and the Federal question must be substantial. *Smith v. Grimm*, 534 F. 2d 1346, 1350 (9th Cir.), *cert. denied*, 429 U. S. 980 (1976); *see also Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F. 2d 1216, 1225-1227 & n. 11 (9th Cir. 1978), *cert. denied*, 444 U. S. 826 (1979); *League to Save Lake Tahoe v. B. J. K. Corporation*, 547 F. 2d 1072, 1074 (9th Cir. 1976). The Court finds that the military retirement statute is not directly in issue and that the complaint does not raise a supremacy clause issue. The Court therefore lacks subject matter jurisdiction over this action.

2. Even assuming plaintiff's claims arise under Federal law, this Court has no jurisdiction to sit in direct review of a state court judgment. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 296 (1970); *see also Francisco Enterprises, Inc. v. Kirby*, 482 F. 2d 481, 484-485 (9th Cir. 1973), *cert. denied*, 415 U. S. 916 (1974).

3. This Court's jurisdiction to enjoin a state court proceeding is strictly limited by the Anti-Injunction Act, 28 U. S. C. § 2283. Plaintiff has not alleged that any of the three exceptions to the limitations of that Act are present here and the Court finds that none is applicable. *See Atlantic Coast Line Railroad Company, supra*, 398 U. S. 281 (1970); *H. J. Heinz Co. v. Owens*, 189 F. 2d 505 (9th Cir. 1951), *cert. denied*, 342 U. S. 675 (1952).

4. Declaratory relief is inappropriate in this case. The Declaratory Judgment Act does not confer an independent jurisdictional basis. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). But even if the Court did have jurisdiction, it would be inappropriate to exercise that discretionary jurisdiction in this case. *See H. J. Heinz Co. v. Owens, supra*, 189 F. 2d 505.

5. Plaintiff's action is barred by *res judicata, Erspan v. Badgett*, 659 F. 2d 26 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3669 (Feb. 22, 1982). *See also Francisco Enterprises, Inc. v. Kirby, supra*, 482 F. 2d at 485; *Flynn v. State Board of Chiropractic Examiners*, 418 F. 2d 668 (9th Cir. 1969). Plaintiff could have appealed the 1973 state court judgment but failed to do so. In addition, plaintiff could have appealed the December 28, 1981 order.

6. Plaintiff's argument that the 1973 interlocutory judgment is void is meritless, *see In re Marriage of Brown*, 15 Cal. App. 3d 838, 844, 126 Cal. Rptr. 633, 636 (1976); *Bensing v. Bensing*, 25 Cal. App. 3d 889, 102 Cal. Rptr. 225 (1972), and, in any event, does not negate the fact that plaintiff could have appealed the 1973 judgment on that ground.

IT IS SO ORDERED.

Dated: April 26, 1982.

/s/ Cynthia Holcomb Hall
United States District Judge

APPENDIX E

STATUTES INVOLVED

Federal

10 U. S. C. § 1408:

(a) In this section:

(1) "Court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U. S. C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U. S. C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U. S. C. 3402(i) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage);

or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned is personally served or is served by certified or registered mail, return receipt requested;

(B) the court is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights

of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) (1) After effective service on the Secretary concerned of a court order with respect to the pay-

ment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired to retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e) (1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall—

(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains

available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(b) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and ap-

plicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U. S. C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U. S. C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U. S. C. 659), provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be

fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out on disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U. S. C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) (1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on

which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

28 U. S. C. § 1331:

"(A) The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U. S. C. § 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

28 U. S. C. § 2283:

"A court of the United States may not grant an injunction to stay proceedings in a State court ex-

cept as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-2139

CHARLES B. ARMSTRONG, JR.,

Petitioner,

v.

ELAYNE A. ARMSTRONG,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

At the outset, petitioner must correct the citation error which appears on page 2 of the petition. Jurisdiction of this Court is sought pursuant to 28 U.S.C. § 1254(1), not 28 U.S.C. § 1257(3).

Respondent Elayne Armstrong's brief in opposition does not join issue with the principal points raised in the petition for certiorari. Mrs. Armstrong's brief does not discuss at all the first question upon which petitioner has requested this Court to grant certiorari, namely the Ninth Circuit's misapplication of this Court's decision in Skelly v. Phillips Petroleum Co., 339 U.S. 667, 673-674 (1950). (See Pet., pp. 18-27.) This misapplication of Skelly was the very essence of the Ninth Circuit decision which petitioner asks this Court to review, and the

lack of a response on this issue is tantamount to a concession of this point by Mrs. Armstrong. This brief will demonstrate that none of the points raised in the brief in opposition have merit as considerations in opposition to certiorari.

ARGUMENT

I

THE DISTRICT COURT DID NOT LACK JURISDICTION BECAUSE THIS CASE HAS AN IMPACT ON A STATE COURT DOMESTIC RELATIONS JUDGMENT

The first argument raised by Mrs. Armstrong in the Brief in Opposition is an argument that neither the Ninth Circuit nor the district court accepted in ruling in her favor below. Relying on Barber v. Barber, 21 How. 582 (1858) and its progeny, Mrs. Armstrong argues that the district court had no jurisdiction whatsoever with respect to domestic relations cases. (Br. in Opp., pp. 8-10.)

This argument is considerably wide of its mark. The Barber line of cases only applies to diversity cases where the plaintiff seeks to have a federal court grant a divorce, make a child custody order, or otherwise perform the traditional duties of a family court. See, e.g. Jagiella v. Jagiella, 647 F.2d 561, 564 and authorities cited in n. 11 (5th Cir. 1981).

This Court's recent decision in

Ridgway v. Ridgway, 454 U.S. 46 (1981), makes it clear why a federal district court has jurisdiction over a claim such as that presented in Colonel Armstrong's complaint. Ridgway states:

> "Notwithstanding the limited application of federal law in the field of domestic relations generally [citations], this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights. . . . And specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. [Citations.] That principle is but the consequence of the Supremacy Clause of our national Constitution." 102 S.Ct. at 54-55.

On the face of the complaint (Pet., pp. A-5 - A-10), it is clear that this case comes within the principle of enforcing

federal rights under the Supremacy Clause against the operation of state law so as to prevent the frustration and erosion of congressional policy embodied in the federal military retirement statutes. Thus, Mrs. Armstrong's first argument in the Brief in Opposition is without merit and misleading. A moment's reflection will indicate that cases such as Ridgway v. Ridgway, supra, and McCarty v. McCarty, 453 U.S. 210 (1981), would never have been decided if the Barber rule absolutely forbade any consideration of a federal issue arising in the domestic relations context.

II

THE CALIFORNIA AUTHORITY CITED BY MRS. ARMSTRONG DOES NOT SHOW THAT A CALIFORNIA COURT HAD JURISDICTION TO TREAT MILITARY RETIRED PAY AS PROPERTY IN 1973

In her Brief in Opposition, Mrs. Armstrong asserts when Colonel Armstrong argues that the 1973 interlocutory judgment is not entitled to res judicata effect with respect to after-acquired property that "Petitioner grossly misstates the California law at the time of the Interlocutory Judgment." (Br. in Opp., p. 11.) Mrs. Armstrong does not discuss any of the authorities cited in the petition. (See Pet., pp. 8-15.) In making her assertion, Mrs. Armstrong overlooks the fundamental

point made by her former husband in the petition for certiorari, to wit: that federal law, not California law, controlled the question of whether there was "property" over which the California superior court had jurisdiction to act in 1973. (Pet., pp. 8-11.)

Mrs. Armstrong does not dispute the proposition that the question of "property" rights in military retired pay was a question of federal law arising under 10 U.S.C. §§ 6321 et seq. in 1973, just as it is today. The fact that a California Court of Appeal had decided, without any consideration of federal law, that military retired pay could be divided as community property [see Bensing v. Bensing, 25 Cal.App.3d 889 (1972)] is not dispositive of the federal question of whether Colonel Armstrong's retired pay was "property" under the federal law which created whatever "property interests" there were in such pay.

Although Mrs. Armstrong's brief accuses petitioner of "grossly misstating California law at the time of the Interlocutory Judgment" (Br. in Op., p. 11), her brief does not tell the whole story. In 1973, the settled California law as reflected in the decisions of the California Supreme Court was that a California court could not

divide military retired pay as community property unless the military officer or enlisted man had already retired and his rights had already vested. In French v. French, 17 Cal.2d 775, 778 (1941), the California Supreme Court held that the California courts could not divide future rights to Fleet Reserve retirement as community property. The Court there stated:

> ". . . under the applicable statutes the appellant will not be entitled to such pay [Fleet Reserve retired pay] until he completes service of fourteen years in the Fleet Reserve and complies with all of the requirements of that service. At the present time, his right to retirement pay is an expectancy which is not subject to division as community property." Id. at 778.

The French case clearly recognized that a military person's right to retired pay was a mere "expectancy" prior to that person's actual retirement. It was not until In re Marriage of Brown, 15 Cal.3d 838 (1976), that the California Supreme Court overruled French v. French and held for the first time that non-vested, contingent rights to retired pay ("mere expectancies") could be

divided as community property.

III

COLONEL ARMSTRONG'S CLAIM WAS NOT BARRED BY THE DOCTRINE OF RES JUDICATA

Mrs. Armstrong contends that Colonel Armstrong's federal challenge to the 1973 judgment is barred by the doctrine of res judicata. (Br. in Opp., pp. 15-18.) The basic reason why the doctrine of res judicata does not apply is that a void judgment has no res judicata effect. Enforcement of a void judgment may be enjoined or collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue. (See Pet., pp. 20-21.) There is no requirement that a challenge to a judgment which void for lack of subject matter jurisdiction must be raised in the original proceedings which led to the judgment which is challenged. Indeed, if this were the requirement, then no case involving subsequent direct and collateral attack on a void judgment would ever be possible. Both as a matter of logic and of law, res judicata does not preclude a void judgment attack when the challenge to subject matter jurisdiction has not been raised or decided in a prior proceeding.

IV

DISMISSAL OF THE COMPLAINT IN THIS CASE WAS NOT A PROPER EXERCISE OF DISCRETION UNDER THE FEDERAL DECLARATORY JUDGMENT ACT; NOR WAS THE ANTI-INJUNCTION ACT A PROPER BASIS FOR THE DISMISSAL

Mrs. Armstrong's brief asserts that dismissal was a proper exercise of the discretion conferred on the district court by Federal Declaratory Judgment Act. (Br. in Op., pp. 21-22.) Controlling precedent, however, teaches that a district court cannot decline to entertain a declaratory relief action as a matter of whim or personal disinclination. Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112 (1962). The issues which petitioner raised in his complaint necessarily called for the federal expertise of a federal judge familiar with federal law. The basic reason for the existence of federal courts is permit litigants to have their federal rights adjudicated in a sympathetic federal forum. If a federal district judge can decline to entertain a case which involves a true federal question, the remedy of federal declaratory relief becomes ephemeral.

With respect to the Anti-Injunction Act (28 U.S.C. § 2283), the injunctive relief sought in this case was sought for the purpose of effectuating the declaratory judgment which petitioner sought. As such,

the injunctive relief fell within an expressly authorized exception of the Act. Moreover, even if injunctive relief had been inappropriate, dismissal would not be appropriate without the court's giving independent consideration to declaratory relief. 6A Moore's Federal Practice, ¶ 57.08[2], at 57-40 and cases cited in footnote 21.

V

THE NEW UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT HAS NO EFFECT ON THIS CASE

In September of 1982, President Reagan signed into law the Uniformed Services Former Spouses' Protection Act [hereinafter Former Spouses Act], which was a rider to the Department of Defense Authorization Act of 1983 (S. 2248). The new Act became effective February 1, 1983. Since the primary thrust of the present case is to obtain a declaration that the 1973 interlocutory judgment was void and had no res judicata effect insofar as it purported to divided Colonel Armstrong's future retired pay, the Former Spouses Act should have no application to these questions. The validity of the 1973 California judgment can only be determined under the law which was in existence at the time that judgment was rendered. There is no language in the Former Spouses Act remotely suggesting that Congress

has intended to change the law applicable to judgments obtained prior to June 26, 1981. The manifest intent of Congress is that this new legislation apply prospectively from June 26, 1981, forward.

As this Court recently observed in United States v. Johnson, ___ U.S. ___, 102 S.Ct. 2579, 2586 (1982), a legislature makes its new rules wholly or partially retroactive or only prospective as it deems wise. Here the Congress has opted for limited retroactivity by applying the legislation forward from June 25, 1981. As to all cases prior to June 26, 1981, the new statute is intended to have no effect whatsoever, except that prior judgments may now be collected through military and naval finance offices.

CONCLUSION

For the foregoing reasons, petitioner urges that this petition be granted and that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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